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SUPREME COURT, U.S.

No. 81 6657

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

DANIEL JOSEPH BAKER,

Petitioner

V.

WALTER D. ZANT,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, STATE OF GEORGIA

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QUESTIONS PRESENTED

I.

WHETHER THE REPEATEDLY IMPROPER ACTIONS OF THE PROSECUTOR SERIOUSLY PREJUDICED PETITIONER'S RIGHTS TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II.

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III.

WHETHER THE IMPOSITION OF THE DEATH PENALTY BASED UPON A FINDING OF THE (b)(2) STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT COMMITTED MURDER WHILE ENGAGED IN THE COMMISSION OF ANOTHER CAPITAL FELONY, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE ADDITIONAL FELONY IS ARMED ROBBERY WHICH IS NOT NOW A CAPITAL OFFENSE. IN REVIEWING PETITIONER'S DEATH SENTENCE, THE GEORGIA SUPREME COURT DID NOT FULFILL THE FUNCTION MANDATED BY THIS COURT IN GREGG V. GEORGIA, 428 U.S. 153 (1976).

IV.

WHETHER THE DEATH SENTENCE AS IMPOSED BY THE JURY WAS IMPROPERLY RECEIVED BECAUSE THE (b)(2) AGGRAVATING CIRCUMSTANCE WAS INCORRECTLY STATED. THUS, PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

V.

WHETHER THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE §27-2534.1(b)(7), UPON WHICH PETITIONER'S SENTENCE IS PARTLY BASED, IS ON ITS FACE, APPLIED IN THE STATE OF GEORGIA, AND AS APPLIED IN THIS CASE, IMPERMISSIBLY VAGUE AND OVERBROAD IN VIOLATION OF THE RIGHTS PROTECTED BY THE GEORGIA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

VI.

WHETHER THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT MADE IMPROPER STATEMENTS TO THE JURY DURING THE TRIAL, THUS VIOLATING PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

VII.

WHETHER PETITIONER'S DEATH SENTENCE SHOULD BE VACATED IN LIGHT OF STEPHENS V. ZANT, 631 F.2d 397 (5th Cir. 1980), (rehearing denied and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (October 5, 1981) (No. 81-89).

VIII.

WHETHER THE INFLICTION OF THE DEATH PENALTY ON A PERSON WHO WAS NINETEEN YEARS OF AGE AT THE TIME THAT THE ALLEGED CRIME WAS COMMITTED, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

IX.

WHETHER DURING THE PUNISHMENT PHASE OF THE TRIAL, THE TRIAL COURT FAILED TO CHARGE THE JURY ON THE LAW OF MITIGATING CIRCUMSTANCES, AND FAILED TO CHARGE THAT MITIGATING CIRCUMSTANCES COULD ACT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES AND, THUS, REQUIRE A SENTENCE OF LIFE IMPRISONMENT RATHER THAN DEATH. THIS ERROR VIOLATED PETITIONER'S RIGHT TO A RELIABLE, NON-ARBITRARY SENTENCING PROCEEDING, PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

DANIEL JOSEPH BAKER, :

Petititoner :

V. :

WALTER D. ZANT, :

Respondent :

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Superior Court of Butts County, Georgia in this capital case.

OPINIONS BELOW

The initial opinion of the Supreme Court of Georgia affirming the Petitioner's sentence of death is reported at 243 Ga. 710, 257 S.E.2d 192 and is reproduced as Appendix "A". The death sentence was vacated by this Court and the case was remanded to the Georgia Supreme Court for further consideration in the light of Godfrey v. Georgia. (Baker v. Georgia, 446 U.S. 961 (1980), Appendix "B") The Georgia Supreme Court subsequently reinstated the death sentence in an opinion reported at 246 Ga. 259, 272 S.E.2d 61 (1980), which is reproduced herein as Appendix "C".

On April 13, 1981, a Petition for Writ of Habeas Corpus was filed in the Superior Court of Butts County, State of Georgia. Petitioner's Writ of Habeas Corpus was denied by the Superior Court on October 14, 1981. (Appendix "D")

Thereafter, Petitioner's Application for Certificate of Probable Cause in the Supreme Court of the State of Georgia was denied on December 3, 1981. (Appendix "E")

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and herein the deprivation of rights secured by the Constitution of the United States. The Superior Court of Butts County, Georgia, denied Petitioner's habeas corpus petition in an order entered on October 14, 1981. (Appendix "D") The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on December 3, 1981. (Appendix "E")

On February 16, 1982, Mr. Justice Powell entered an Order extending the time for filing this Petition up to and including May 2, 1982. (Appendix "F")

This is a petition for a Writ of Certiorari to the Superior Court of Butts County, Georgia, from its denial of Petitioner's Writ of Habeas Corpus.

This Petition is being timely mailed pursuant to Rule 28.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> [N]or shall any person...be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law...

Relevant provisions of the Georgia Code are set forth in Appendix "G" hereto.

FACTS

Petitioner, DANIEL JOSEPH BAKER, was indicted along with Ricky Lee Massey for the murder and armed robbery of Dennis Beatenbo. Petitioner, a youth of nineteen, and Massey, sixteen, were drinking and driving around town on the evening of May 5, 1978, when they picked up Beatenbo, who was hitchhiking. (Tr. 150) Beatenbo, who had been drinking heavily, was wearing a shirt bearing the letters "NORML"-the acronym for the National Organization for the Reform of Marijuana Laws. (Tr. 316)

The three drove to Beatenbo's parked car from which they obtained a bottle of liquor, and then drove around while drinking until they finally ended up on Pirkle Road in Gwinnett County, Georgia, near Norcross. Massey, the driver, began "cutting donuts", or making deep tire tracks, with the automobile, and Beatenbo became sick in the back seat of the car. (Tr. 150) He was vomiting and the car was stopped to enable him to get out. (Tr. 151) His illness was apparently attibutable to his extreme level of intoxication. The State stipulated that the ethyl alcohol content in the victim's blood was .39% (Tr. 107)--almost four times the blood alcohol level of .10% which constitutes legal intoxication. The criminal investigator for the office of the District Attorney (Tr. 109) testified:

> Q: What generally is the reading that you consider drunk?
>
> A: It's .10.
>
> Q: And if somebody had .39 alcohol, would that be considered very drunk.
>
> A: I think he would be unconscious.
>
> Q: He probably would be passed out would he not?
>
> A: Yes. (Tr. 159)

Petitioner got out of the car and struck Beatenbo in the face with the liquor bottle. In the opinion of the State's medical witness, Dr. Dove, Beatnebo was thereby rendered unconscious. (Tr. 96-103) While Beatenbo lay unconscious on the ground, Petitioner shot him three times in the chest. Beatenbo

died instantaneously, according to Dr. Dove. (Tr. 97) After he was dead, Petitioner fired a fourth shot into his body between the legs. (Tr. 98, 100-101) Petitioner then took the victim's wallet containing $22 and his wrist watch. (Tr. 151-152)

Petitioner testified during the sentencing phase of the trial that he did not kill the victim for the purpose of robbing him and did not have any intention of harming the victim prior to his sudden violent outburst. (Tr. 249, 251) Petitioner stated that he had no explanation of why he killed Beatenbo. Petitioner testified that he took the wallet and watch after the victim was dead in order to make the crime appear to be a robbery. (Tr. 257, 265) Petitioner stated that he knew what he did was wrong and that he asked God to forgive him for it. (Tr. 253)

BEFORE THE SUPERIOR COURT OF GWINNETT COUNTY

Petitioner was convicted of murder and armed robbery after a brief trial. Following the Georgia procedure, the same jury then sat to determine whether to recommend the death penalty. During this phase of the trial, Petitioner introduced evidence that, in the words of the Georgia Supreme Court, "depicted a rather harrowing history of child abuse" (p. , infra)[1/]

[1/] Petitioner is illegitimate. (Tr. 207) When he was four or five, his mother shot and wounded herself in his presence and said she would have killed him had she had another bullet. (Tr. 208) In the years Petitioner and his sister lived with their mother, there were beatings, mistreatment and an utter lack of affection. (Tr. 208, 237-238) When later they lived with their father, he tried to kill them. (Tr. 209) Relatives who briefly acted as step parents were no better. Petitioner was made to stay in a small, unlighted, windowless room for as long as a week at a time, even after a wild animal invaded it and had to be shot to save Petitioner's life. (Tr. 210-214) At age 8, Petitioner was adopted, but his adoptive father was an alcoholic who constantly beat and otherwise mistreated Petitioner, and was heard by Petitioner often to say that he had not wanted him. (Tr. 221-222, 242-243) After leaving the Marine Corps (which he joined as an alternative to being prosecuted on the complaint of his adoptive father in a dispute over the ownership of an automobile), Petitioner met a girl, fell in love and made plans to marry. (Tr. 245-248) That affair ended tragically. The girl was accidentally shot and killed. (Tr. 225, 248) Petitioner took to drink and was drinking heavily at the time of the Beatenbo murder a few months later. (Tr. 225, 248-249)

The State asked for the death penalty on the basis of two aggravating circumstances specified in the Georgia statute: (1) the murder was committed while the Petitioner was engaged in the commission of an additional capital felony, the armed robbery of the victim, and (2) the murder was outrageously or wantonly vile, horrible and inhuman, in that it involved torture to the victim or depavity of mind on the part of the Petitioner. Petitioner moved to strike both of these statutory aggravating circumstances. Counsel argued that the first statutory aggravating circumstance must be struck, because armed robbery was not a capital felony, and that, accordingly, a jury recommendation of the death sentence could not constitutionally be based upon a finding that the murder was committed while the petitioner was engaged in committing an armed robbery. (Tr. 204-205)

Petitioner moved to strike the other, catchall aggravating circumstance on two grounds. Petitioner argued that the catchall aggravating circumstance in its broad and vague phrasing is unconstitutional and in violation of the Fourteenth Amendment to the United States Constitution. Counsel asserted also that there was no evidence of torture within the meaning of the statute. (Tr. 203-205) He urged that, if the evidence adduced in the guilt or innocence phase of the trial was sufficient to support a finding of torture to the victim, then the death penalty would be appropriate for any murder, in violation of the teachings of Furman v. Georgia, 408 U.S. 238 (1972).

The trial court denied the motions to strike and submitted both statutory aggravating circumstances to the jury, but without any instruction that went beyond the statutory terms. (Tr. 303-302) The jury returned a recommendation of death, stating that: (1) "the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture to the victim or depravity of mind on the part of the defendant." and

(2) "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbo". (Tr. 309) Owing to the garbled finding of the section (b)(2) capital felony provision, the trial court inquired:

> THE COURT: I will ask you Mr. Foreman, did you intend to state in your writing the offense of murder was committed while the offender was engaged in the commission of an additional capital felony, to wit: the armed robbery?
>
> MR. FOREMAN: Yes sir.
>
> THE COURT: I believe I'm going to let you correct that so that it will include the entire language of the--I think you intended to do so but I believe you have omitted a sentence in it, you may do it there in your jury box if you see fit. (Tr. 309-310)

Apparently, the jury foreman then changed the language of the jury finding to conform to the instructions of the judge. The jury was not polled to insure that the entire panel accepted this unusual modification.

BEFORE THE GEORGIA SUPREME COURT

On appeal to the Georgia Supreme Court, it was argued again that neither statutory aggravating circumstance could constitutionally support the imposition of the death sentence. The Georgia Supreme Court sustained the Petitioner's sentence of death in the face of these arguments, but without seriously addressing them.

Under the sentence review heading of its opinion, the Court asserted that "The jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to

the victim", and it stated a conclusion that "the evidence supports the jury's finding..." (p.3a, infra; emphasis added) In fact, the question of whether there was an aggravated battery of the victim was not submitted to the jury and it made no finding that there was such a battery.

The Court also stated that the jury found that the murder was "committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery." (p.3a, infra) In fact to the extent that the jury made any intelligible finding at all on this point, its findings did not use the adjective "capital" in describing the felony of armed robbery. (p.40, infra) In response to the contention that it was unconstitutional to use armed robbery as "another capital felony" for purposes of the aggravating circumstance described in Ga. Code §27-2534.1(b)(2), the Court said merely that it had already been decided in Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), "that those crimes which were capital felonies in Georgia" when the Code section was enacted "continue to be capital felonies within the meaning" of the section. (p.2a, infra)

IN THIS COURT

In the October Term 1979, Petitioner sought review of the Georgia Supreme Court decision. (No. 79-5567) Petitioner attacked the constitutionality of both statutory aggravating circumstances as applied to his case and the Georgia Supreme Court's error of affirming the applicability of the section (b)(7) circumstance based on its mistaken notion that the jury had found the existence of an aggravated battery. Petitioner argued, as in Godfrey v. Georgia, 100 S.Ct. 1769 (1980), that the Georgia Supreme Court had adopted an unconstitutionally broad and vague interpretation of the catchall aggravating circumstance in affirming his death penalty. One week after this Court reversed Godfrey's death sentence, it vacated Petitioner's sentence of death and remanded his case to the Georgia Supreme Court for further consideration in the light of Godfrey.

THE ACTION BY THE GEORGIA SUPREME COURT ON REMAND

Following this Court's remand, Petitioner filed a timely Motion for Additional Briefing and Oral Argument, with an accompanying memorandum. The Georgia Supreme Court summarily denied Petitioner's motion.

On September 8, 1980, the Georgia Supreme Court reinstated Petitioner's death sentence (Appendix "C"). In its opinion, which reaffirmed the intitial sentence, it said that the decision in Godfrey was limited "to the specific factual circumstances present in that case". (p.6a, infra) The Georgia court restricted its consideration to distinguishing those specific circumstances from the facts in this case. The Court did not consider any of the mitigating factors that were present in this case, but not in Godfrey, nor did it mention any of the aggravating factors that were present in Godfrey but not in this case (e.g. that Godfrey killed two persons). The opinion wholly failed to address the need for jury instructions, setting forth a constitutionally acceptable interpretation of the section (b)(7) aggravating circumstance.

On December 8, 1980, Petitioner again filed a Petition for a Writ of Certiorari in this Court. The Petition was denied. Baker v. Georgia, 446 U.S. 961 (1980).

STATE HABEAS CORPUS PROCEEDINGS

On April 13, 1981, a Petition for a Writ of Habeas Corpus, for a stay of execution and for leave to proceed in forma pauperis were filed in the Superior Court of Butts County, State of Georgia. The Honorable Alex Crumbley ordered a stay of Petitioner's execution pending resolution of the within proceedings. On July 14, 1981, a hearing was held on Petitioner's Writ of Habeas Corpus.

Petitioner's Writ of Habeas Corpus was denied by the Superior Court on October 14, 1981. Notice of Appeal was timely

filed as was an Application for Certificate of Probable Cause in the Supreme Court of Georgia. The Application was denied by that Court on December 3, 1981.

REASONS FOR GRANTING THE WRIT

I.

THE REPEATEDLY IMPROPER ACTIONS OF THE PROSECUTOR SERIOUSLY PREJUDICED PETITIONER'S RIGHTS TO A FAIR TRIAL, IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Among the improper actions of the prosecutor were the following:

(a) The prosecutor told the jury his personal opinion about the defendant's guilt or innocence.

(b) He implied that the jury did not hear all the evidence against the defendant. He suggested that other witnesses could have testified against the defendant.

(c) He introduced facts during his closing argument that were not part of the record and were not admissible. He intentionally misstated the evidence.

(d) He tried to impeach a defense witness by telling the jury what he knew about a disputed incident.

(e) He induced a government witness to make a prejudicial statement that both he and the witness knew the court had already ruled inadmissible.

(f) He offered his personal opinion about the existence of aggravating circumstances.

(g) He persuaded the jury to impose a death sentence by using inflammatory language and other arguments designed to make the jury sentence the defendant to death for reasons wholly extraneous to the crime.

This aspect of the case, as the Fifth Circuit noted in a similar situation, "presents nothing new--no new issue of law or unique factual configuration. It presents rather a situation far too common and too often condemned by this court to be in any manner excusable. We must deal again with the grossly improper prosecutorial comment during closing argument which substantially prejudiced defendant's right to a fair trial on the

evidence presented in his case." United States v. Garza, 608 F.2d 659, 661 (5th Cir. 1979) (emphasis added). In that case, as in the present action, the conduct of the prosecutor, even in the absence of a defense objection, so prejudiced the right to a fair trial that a new trial was required.

A. Opinion regarding guilt or innocence.

In his closing argument, the prosecutor asked the jury to enter a "guilty" verdict because his personal knowledge of the case lead him to believe that the defendant was guilty:

> I don't believe there is any question in this case, not only beyond a reasonable doubt, but beyond any doubt that this defendant committed the murder and armed robbery of Dennis Beatenbo. (Tr. 184-85) (Emphasis added)

The prosecutor's statement violates the most basic rule that counsel "is never justified in expressing the opinion ...that one whom he is pursuing is guilty. Such opinion is not legal evidence and in no circumstances, and at no step of the proceedings, is he entitled to thrust it into the case." Broznack v. State, 109 Ga. 514, 516 (1900).

It has been widely held that "a prosecutor is prohibited from injecting his own personal opinions in a case..." Brown v. Estelle, 468 F.Supp. 42, 46 (N.D. Tex. 1978), aff'd 591 F.2d 1207 (5th Cir. 1979). Such "comment has repeatedly been held to amount to reversible error". United States v. Lamerson, 457 F.2d 371, 372 (5th Cir. 1972), citing United States v. Brown, 451 F.2d 1231 (5th Cir. 1971); Gradsky v. United States, 373 F.2d 706 (5th Cir. 1967); McMillian v. United States, 363 F.2d 165 (5th Cir. 1966). In reaffirming this rule, the Fifth Circuit has relied, in part, upon standards of professional conduct. See e.g. Hall v. United States, 419 F.2d 582 (5th Cir. 1969); United States v. Corona, 551 F.2d 1386 (5th Cir. 1977). The prosecutor's statement is a clear violation of the ABA Criminal Justice standard that "[i]t is unprofessional conduct for the prosecutor to

express his or her personal belief as to...the guilt of the defendant," ABA Criminal Justice Standards, The Prosecution Function, 3-5.8.[2/] It also transgresses the Disciplinary Rule of the Code of Professional Responsibility that "a lawyer shall not...assert his personal opinion...as to the guilt or innocence of the accused." Code of Professional Responsibility, DR 7-106(c)(4).

The rule that a prosecutor may not express an opinion about the defendant's guilt is also grounded in the Sixth Amendment right to counsel. For if the prosecutor is permitted to inject his opinion about the defendant's guilt:

> Where would this leave a criminal defendant who was entitled to representation, but whose counsel does not believe in his innocence? Must his counsel nevertheless assert such a belief in order to counter the expressed opinion of government counsel, or does such a defendant have an unrefuted witness against him, in the form of the prosecuting attorney? Or should a prosecutor be permitted to argue, for example, "Members of the jury, I tell you that in my opinion trained to examine evidence this defendant is guilty as hell. I know it. Even his own counsel knows it. Oh yes, his counsel asked you to find him not guilty, but I noticed that not once did he suggest to you that he had even a shadow of belief in his client's innocence. Why did he? Because his conscience wouldn't permit him to. Even his own lawyer doesn't think he is innocent, but he wants you***" etc. etc. That is not the argument made in this case, but we see no stopping point except the ones stated in the canon. Hall v. United States, 419 F.2d 582, 586 (5th Cir. 1969).

Such expressions are especially improper where, as here, the prosecutor implied that he had knowledge which was not presented to the jury. Id. at 586.

(b) Suggestion that jury did not hear all evidence.

After presenting the State's evidence, the prosecutor said to the jury, "Obviously I did not tell you everything..." (Tr. 181) He later suggested that he could have called more witnesses to prove the minute details about the crime that might raise some doubt, but that the additional evidence was not required:

[2/] The ABA points out that such expressions of personal belief "are a form of unsworn, unchecked testimony and tend to exploit the influence of the prosecutor's office..." Id. Commentary at 3-89.

> Witnesses, State is required to prove the guilt beyond a reasonable doubt. No need in bringing in all the witnesses and every possible witness, every Tom, Dick and Harry that is of some insignificant consequence. (Tr. 184)

During the crucial sentencing phase he implied that a defense witness lied, but that he did not have a rebuttal witness ready only because he was surprised by the testimony:

> I submit to you she could have gotten up here to see me if she had wanted to. But, you know, if--I don't know what they are going to testify to, I can't have witnesses here to rebut it. (Tr. 273)

The necessary implication of his comment is that if he knew the content of the testimony ahead of time, he could find a witness to discredit it.

The prosecutor may or may not have been able to call other witnesses. Even if the prosecutor could have called additional witnesses, his statement calls for the jury to trust and accept his assertion as if it were testimony. His comments violate the well established rule that a prosecutor "may not suggest that evidence which was not presented at trial provides additional grounds for finding defendant guilty." United States v. Garza, supra, at 663. Specifically, the prosecutor may not imply that "he could have called additional witnesses whose testimony would have supported his version of the case." United States v. Morris, 568 F.2d 396, 401 (5th Cir. 1978) citing Ginsburg v. United States, 257 F.2d 950, 954-55 (5th Cir. 1958); Nalls v. United States, 240 F.2d 707, 709-11 (5th Cir. 1957). In Ginsburg, supra, the prosecutor said that he "probably" could have found witnesses to refute defense character witnesses. The court held that even in the absence of an objection, the comment was plain and reversible error, because the comment "would have been magnified in its influence on the jury by an objection and motion for mistrial." Id. at 955.

(c) Introducing facts outside the record and misstating evidence.

The purpose of an attorney's "closing argument is to assist the jury in the analyzing, evaluating and applying the evidence." United States v. Garza, supra, 662. If an attorney makes comments which are not supported by evidence, "it is improper". Id. at 663. The ABA Criminal Justice Standards provide:

> It is unprofessional conduct for the prosecutor intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice. The Prosecutor Function, Section 3-5.9. Also see ABA Code of Professional Responsibility DR 7-106(c)(1).

The Fifth Circuit has therefore ruled that a prosecutor may not "state facts of his own knowledge, not in evidence and not part of the evidence to be presented or...make unwarranted inferences or insinuations calculated to prejudice the defendant." Dunn v. United States, 307 F.2d 883, 886 (5th Cir. 1962).

The prosecutor in this case repeatedly based his arguments favoring both conviction and the death sentence upon allegations not in evidence. Among the most egregious comments by the prosecutor were his frequent references to the good qualities of the victim and the victim's family. For example, during the sentencing phase, the prosecutor blurted out:

> What about Dennis Beatenbo? He's got a family, sisters and brothers and a mama and a daddy here. He worked in the construction work and, you know, he worked there for the last eight years. Tough life. Full of life. Enjoyed life. (Tr. 273)

The statements that the victim had a fine family and was a good worker are hardly relevant to the issue of whether a murder was committed under aggravating circumstances warranting the death penalty. More importantly, there was no evidence in the record to support the prosecutor's statement. He thereby used the closing argument to introduce evidence that would not be admissible at trial. Moreover, by drawing the jury's attention to

the presence of the victim's family, he clearly intended to make the jury impose a death sentence based upon factors which had no relevance to the crime involved. As a case cited by the Code of Professional Responsibility holds, such unsupported references to the qualities of the victim and his family are never proper:

> "The record in the case at bar was silent concerning the qualities and character of the deceased. It is especially improper, in addressing the jury in a murder case, for the prosecuting attorney to make reference to his knowledge of the good qualities of the deceased where there is no evidence in the record bearing upon his character... A prosecutor should never inject into his argument evidence not introduced at the trial." People v. Dukes, 12 Ill.2d 334, 341, 146 N.E.2d 14, 17-18 (1957). (Emphasis added)

The references to the presence of the victim's family is especially improper during the death sentencing argument, because Georgia law imposes the death penalty only under specific aggravating circumstances. The qualities of the victim or presence of the victim's family are not factors which may be considered by the jury.

The prosecutor made numerous other allegations which were not supported by evidence in the record. He alleged that the defendant killed the victim because he "wanted to see if [his gun] would kill a human being". (Tr. 183) And that the defendant was "proud" of the murder. (Tr. 183) These statements are opinions outside the record. He told the jury that to deter crime there was "no viable alternative" to the death penalty. (Tr. 272) An "inadequate" sentence (meaning in this case a sentence of life in jail) could not deter criminals "[no] matter how swiftly you catch them or how you punish them..." (Tr. 272) Certainly, no such evidence was presented at trial. Experts believe that such claims are highly controversial and the prosecutor improperly used his closing argument "to 'testify' as an 'expert witness'." United States v. Garza, supra, 662.

In attempting to refute the mitigating factors presented by the defense, the prosecution made reference to his family and

implicitly compared the way he was raised to the way defendant was raised. (Tr. 272, 276) Such comments are the basis for reversible error where, as here, "[r]eferences to the prosecutor's family was wholly outside the record [and] the defense attorney did not invite such argument." Brown v. Estelle, supra, 46.

The prosecutor convinced the jury to impose the death sentence by telling them that the defendant "has the capabilities of killing again without any remorse". (Tr. 277) No evidence supported this highly inflammatory assertion. The prosecution also persuaded the jury that the victim was tortured, in part, because the defendant "drag[ged] him over to the side of the road." (Tr. 276) Yet, there was no evidence that the victim had ever been dragged anywhere by anyone. Once again, the prosecutor's statement "was a bald assertion of a fact not in evidence and therefore improper." Hall v. United States, supra, 585.

(d) Injecting personal knowledge.

During the sentencing phase of the trial, the prosecutor used his cross-examination to tell the jury his personal knowledge about a disputed matter. A defense witness, Petitioner's adoptive mother, had mentioned in passing, the content of a telephone call she received from the prosecutor's office. The prosecutor then seized upon the remark to attempt to destroy the witness' credibility. He used cross-examination to tell his side of the story, hardly permitting a response from the witness:

> Q: And the truth is I tried to get in touch with some of your relatives because I knew that you were alone didn't I?
>
> A: Sir, I am--
>
> Q: Mrs. Baker, would you answer that question, please, ma'am?
>
> A: I--
>
> Q: Do you recall that I said you are alone?

A: After you found out I was upset, yes sir, you did.

Q: Mrs. Baker, isn't it really true I asked were you alone, was anybody close by?

A: Not until--

Q: I have some bad news to give you?

A: Not until you told me you did not, I thought it was some person--some penny, small thing. You said no, this is much worse, that is your very words. (Tr. 228)

The prosecutor thus told the jury that he was a fair, reasonable and sensitive man. He apparently suggested to the jury that such a considerate man would not request the death penalty unless it was necessary. During his closing argument, he criticized the woman for not speaking with him prior to trial:

> I submit to you she could have gotten up here to see me if she had wanted to. (Tr. 273)

These statements once again violate the well established rule that "[i]t is improper for counsel...to state facts of his own personal knowledge." Dunn v. United States, 307 F.2d 883, 885-6 (5th Cir. 1962). This rule is particularly important for the prosecutor, because he "has the advantage of official backing". Hall v. United States, supra, 536. Hence, his "assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88 (1934).

(e) Eliciting objectionable testimony.

The prosecutor induced a government witness to express prejudicial opinion testimony after the court had ruled that the testimony should be excluded. This testimony concerned the highly controversial and inflammatory issue of the fourth shot, which was fired after the victim died and which the prosecutor improperly urged the jury to use as a basis for the finding of the (b)(7)aggravating circumstances. To determine if the defendant had an intent to torture, the jury had to determine the

intent or motive with which the last shot was fired. Before the state medical examiner testified, defendant's counsel, Mr. Pelham, objected to any testimony about the medical examiner's opinion regarding the intended purpose of the fourth shot. Defense counsel had advance warning that the prosecutor would elicit from the medical examiner his extraordinarily improper speculation about the defendant's intention in firing the post-mortem shot because this testimony had been improperly advanced in the previous trial of co-defendant Massey. (Tr. 92) Defense counsel made the objection in advance because "once he testifies or has testified, harm would be done." (Tr. 92) The court agreed, and excluded the testimony, saying that the jury must draw its own conclusions from the factual evidence. The prosecutor then signaled the witness that they should try to bring out this conclusion. Defense counsel reiterated his objection. The colloquy between the court and lawyers is as follows:

> [t]he jury was retired from the jury box.)
>
> THE COURT: State your motion.
>
> MR. PELHAM: Your Honor, I understand Dr. Dove is to be the next witness. From reading what he testified in another case having to do with the co-defendant, and reading his testimony in that case, there are certain things in there I anticipate in all probability he will probably testify to, and I would like at this time to interpose an objection before he does, because I think once he testifies or has testified, harm would be done. What I specifically refer to--
>
> THE COURT: I don't know what he is going to be asked or what--
>
> MR. PELHAM: Well, I read from the transcript the last--transcript of the last trial, page 32, the transcript he was asked about the--
>
> THE COURT: That is the trial of the co-defendant?
>
> MR. PELHAM: Yes, this is the trial of the co-defendant, this is what I am going to object to if he is going on--if he is going to testify to this. If he is not then--so be it. He was asked about the wound in the area between the man's legs, and he said well, there was a little hemorrhage around his wound. ["]My feeling certainly would

be we know this wound was not in an area meant to inflict death, it was only meant to inflict pain. My opinion would be this shot was probably fired after the others were fired and after the body quit moving, the shot was fired in an effort to determine whether or not there was still life in the body.["]

Your Honor, I would object to any statement.

THE COURT: I think that is objectionable. Dr. Dove can testify as to where the shot was.

MR. PELHAM: That's correct.

THE COURT: And the conclusion I believe would have to be--

MR. PELHAM: As to what the defendant's intent was, that is certainly objectionable, as to why he shot him.

THE COURT: I think the best thing to do would be to leave that out.

MR. HUFF: I think that if Your Honor please, it would be admissible, that he could state that type of wound was not the type of wound that would inflict death.

THE COURT: Certainly. I say he can testify to that part, no question about that.

MR. HUFF: But, Dr. Dove, you understand--

DR. DOVE: Yes.

MR. HUFF: Yes.

MR. PELHAM: I just--

MR. HUFF: So, we will try--

THE COURT: I think the jury would have to draw the conclusions, Dr. Dove.

MR. HUFF: We will try to bring it out.

MR. PELHAM: That was my objection. (Tr. 92-94) (Emphasis added)

The prosecutor then elicited the following response:

THE WITNESS: This of course was not an effort to kill the individual, it's not the type of wound that would kill him. (Tr. 99)

The prosecutor thus elicited the precise testimony that the court had ruled objectionable. The extremely prejudicial nature of this inflammatory speculation would contaminate the proceeding if it had been announced inadvertently. When the prosecutor

elicits such testimony in violation of a court order, reversal is clearly mandated.

(f) Opinion regarding aggravating circumstances and other matters.

The prosecutor did not limit his expressions of personal opinion to matters of guilt or innocence. He repeatedly offered his opinion about whether there were aggravating circumstances justifying the death sentence. He also offered his opinion about other matters which were to be decided by the jury.

He told the jury that he believed the last shot fired at the victim should fulfill the malice requirement. In describing the wound, he said, "Now if that doesn't indicate to me malice, ill feelings..." (Tr. 183). He offered his opinions on punishment by referring to life in jail as a "slap on the wrist" that "serves no useful purpose". (Tr. 272) He argued to the jurors, "...you know and I know in our human experiences that people in prison can and have the capabilities of killing again. There is no viable alternative for these type killers." (Tr. 272)

Regarding the mitigating evidence presented by the defense, he said, "and you know I almost thought that his adoptive father, Bill, was on trial today." (Tr. 273) Of the final gunshot wound, he said, "If that ain't depravity of the mind I don't know what is... And if you want to add insult to injury, I tell you what gets me, he took off and he went over to the Krystal and had a coke." (Tr. 274-275) Later he added, "If that ain't torture, then I don't understand the word torture." (Tr. 276) The prosecutor offered his personal analysis of the defendant's specific intent: "I tell you what was on his mind, getting whatever that guy had was what was on his mind." (Tr. 275) He told the jury that he didn't think the defendant was sorry about what he had done: "Remorse. The only remorse I have detected is that he got caught..." (Tr. 275) He told the jury that a murder involving robbery fulfilled the (b)7 requirements: "(i)f that type of killing isn't outrageously and wantonly vile

and wantonly inhuman, I don't know what is." (Tr. 276) Finally, he offered his opinion as a prosecutor that the defendant "has the capabilities of killing again without remorse." (Tr. 277)

All the above comments violated the previously discussed rule that "it is improper for counsel to express his personal opinion." Dunn v. United States, supra at 886. Because the prosecutor has an obligation of even-handedness and represents the government, "his power to persuade is great". Hall v. United States, supra at 588. His opinion that, for example, defendant had the capacity to kill again is a kind of "expert testimony" which the jury cannot lightly disregard. See e.g. United States v. Garza, supra at 662. The comment forces a juror to impose the death sentence or be responsible for a later killing that was predicted by the prosecutor.

(g) Inflammatory language and arguments.

The prosecutor labeled the defendant as "one mean man", (Tr. 280) and continuously used prejudicial terms, including "pumped him full of bullets" (Tr. 279) and "blowing him away". (Tr. 274) Use of such prejudicial language by a prosecutor has frequently created reversible error without regard to an objection of defense counsel. Steele v. United States, 222 F.2d 628, 631 (5th Cir. 1955) held that a prosecutor's characterization of the defendant as a "Dr. Jekyll and Mr. Hyde" was reversible error and that no objection from defense counsel was necessary. In Hall v. United States, supra, the prosecutor's description of the appellant as a "hoodlum" was one basis for reversible error because:

> [t]his type of shorthand characterization of an accused, not based on evidence is especially likely to stick in the minds of the jury and influence its deliberations. Out of the usual welter of gray facts, it starkly rises--succinct, pithy, colorful, and expressed in a sharp break with the decorum which the citizen expects from the representative of his government. At 587.

Similarly, a prosecutor's description of a murder as an "assasination" is an "unnecessary appeal to passion and prejudice" and warranted reversal even though defense counsel did not object. United States v. DeLoach, 504 F.2d 185, 193 (D.C. Cir. 1974).

The prosecutor also made appeals for the jury to impose the death penalty based upon considerations wholly irrelevant to the crime involved. He asked the jurors to enter a verdict not upon their individual judgments, but to "render the conscious [sic] of this community." (Tr. 278) He asked for the death penalty to protect people in different circumstances from the threat of all potential killers:

> ...If the defendants know they go on and kill him and they are caught and tried they are going to get a death sentence, it will be like an invisible shield for all people who work alone in a convenience store or the young woman who was caught and abducted in a shopping center. It protects them because these people say wait a minute, if I just kidnap them or I just rob them and I don't kill them and I am caught, I will just get a prison sentence, but I know if I can go on and kill them and I am caught then I will face the electric chair. And it will raise that shield.
>
> We haven't had that shield in a great number of years and I submit to you that we need that shield to protect these innocent people out here. (Tr. 271-2)

The prosecutor's statement is very similar to other deterrence arguments resulting in reversible error. In Hanford v. United States, 249 F.2d 295, 298 (5th Cir. 1957), Judge Wisdom reversed a conviction for illegal possession of nontax-paid whiskey on the sole grounds that the prosecutor told the jury that he had "too many friends" and his friends' children get run over, up and down the highways "by drunk drivers". In Brown v. Estelle, supra, at 48, the prosecutor urged jurors to "voice your opinion in this community...that's why you're here today." The prosecutor told the jury "we have a crisis in this community with thieves...why don't they do something about it. The thieves are eating us up out there...I hope it's dawned on you that 'they' in the final analysis are you twelve people." The court ruled

that the comments were designed to impose a sentence upon the defendant based upon the need to control other thieves:

> Again these comments urge the jury to impose a sentence on petitioner not only for what he had done, but for what other thieves and criminals were doing. Again it was error and prejudicial to the defendant. Similarly, this prosecutor sought a death sentence against defendant not only for what he had done, but the acts of others who murdered lone workers in convenience stores or women in shopping centers. Brown, supra, at 48.

Most significantly, the prosecuting District Attorney, Bryan Huff, prepared an article entitled, "Death Sentence Cases", to be distributed to prosecuting attorneys throughout the state. This article was introduced in evidence at the July 14, 1981 hearing on the Petition for Writ of Habeas Corpus, as Petitioner's Exhibit No. 1. The treatise, a manual on how to obtain the death penalty, instructed the prosecutor to argue to the jury that capital punishment is a deterrent to like crimes. Huff, supra at 23, 26-28. This treatise is the best tangible proof of the prosecutor's true subjective feelings and intentions.

The California Supreme Court has repeatedly and emphatically held that this type of deterrent argument constitutes reversible error whether or not an objection is raised at trial. People v. Love, 56 Cal.2d 720, 366 P.2d 33 (1961); People v. Ketchel, 59 Cal.2d 503, 381 P.2d 394 (1963). The Supreme Court of Washington has also adopted this view. Hawkins v. Rhay, 78 Wash.2d 389, 400, 474 P.2d 557, 564 (1970). In Love, supra, during closing argument, the prosecutor urged the jury to impose the death penalty because such penalty would serve as a deterrert to others. The court held that such argument on the part of the prosecutor constituted prejudicial error:

> There is no legislative finding, and it is not a matter of common knowledge, that capital punishment is or is not a more effective deterrent than imprisonment. Since evidence on this question is inadmissible, argument thereon by prosecution

> or defense could serve no useful purpose, is apt to be misleading, and is therefore improper. 366 P.2d at 39.

Additionally, New York University law professor Stephen Gillers has recently argued that a deterrence argument at the sentencing stage is an uninformed guess and at odds with the need for individualization and the recognition of the finality of death. Such an argument violates the Eighth Amendment requirement of individualized sentencing in capital cases. Gillers, Deciding Who Dies, 129 U.Pa.L.Rev. 1, 53 (1980).

Professor Gillers aptly concluded:

> The finality of death ought separately to affect our tolerance for deterrence in capital cases. In non-capital cases, deterrence speculation will translate into length of imprisonment. A judge may add two years to a five year sentence because he or she believes the longer term will prevent other crimes. Imprisonment is measured with numbers. There are no comparatives in death sentencing. Death is infinite. It is not merely the highest number. We ought to hesitate before allowing execution to rest solely on a guess about its consequences, however differently we may strike the balance in non-capital matters. We ought also to keep in mind that in non-capital cases a guess can be revised--that is the term shortened--if new facts or new attitudes toward old facts, though not altering guilt, lessen our wish to set an example. Modification after execution is impossible. Id. at 53. (Emphasis added)

Finally, the prosecutor argued that the police had admirably done their duty. (Tr. 278) The Fifth Circuit has held that it is reversible error for a prosecutor to express his opinion that a police officer "was doing his duty to his country". United States v. Brown, 451 F.2d 1231, 1236 (5th Cir. 1971) The prosecutor implied that defense counsel represented Baker only out of a sense of "duty", rather than a belief in his innocence, (Tr. 278) and further suggested that he, personally, had somehow "insured" the rights of the defendant. (Tr. 277)

(h) Cumulatively, the prejudicial comments require reversal.

The cumulative weight of the prosecutor's comments were extremely prejudicial and require a reversal. Anything less

than reversal would be a clear message to prosecutors that courts will permit improper conduct in order to sentence a man to death. The Fifth Circuit "has passed too many times on this kind of comment by prosecutors to permit it to continue by allowing it to be brushed under the rug under the harmless error doctrine." United States v. Brown, supra at 1236. Even "the sufficiency of the evidence to establish guilt does not cure the conduct." Duggan Drug Stores, Inc. v. United States, 326 F.2d 835, 837 (5th Cir. 1964).

The failure of defense counsel to object to the improper conduct does not eliminate the need for a new trial. The Fifth Circuit has quite frequently reversed convictions where the prosecution committed error and defense counsel failed to object. United States v. Brown, supra; United States v. Lamerson, 457 F.2d 371 (5th Cir. 1972); Steele v. United States, 222 F.2d 628 (5th Cir. 1955); United States v. Garza, supra; United States v. Corona, 551 F.2d 1386, 1391 n. 5 (5th Cir. 1977); Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969). Regardless of whether defense counsel should have objected, "at some point the transgressions of the prosecutor cumulated so greatly as to be incurable; then objection to these extremely prejudicial comments would serve only to focus the jury's attention on them." United States v. Garza, supra, at 666.

The error cannot only be attributed to the prosecutor. For "[i]ndeed, the trial judge has an obligation in the interests of fairness and justice to stop the prosecutor from delivering a greatly prejudicial argument sua sponte." United States v. Corona, supra at 1391 n. 5, citing Viereck v. United States, 318 U.S. 236 (1943). The Georgia Court of Appeals in Howard v. Renfroe, 93 Ga. App. 59 (1955) citing Butler v. State, 142 Ga. 286 (1914), stated: "The gist of the error is that where rebuke is not made or cautionary instructions given, the improper argument goes with the apparent sanction of the Court." At 288. (Emphasis added) Petitioner here seeks reversal on the grounds

that the trial judge failed to cure the improper argument sua sponte, or failed to rebuke the prosecutor, and thus sanctioned the prosecutor's improper conduct.

The court cannot treat the error as harmless unless it was "harmless beyond a reasonable doubt". United States v. Hayward, 420 F.2d 142, 145 (5th Cir. 1969). In this instance, the jury had the discretion to recommend the death sentence after considering aggravating and mitigating circumstances. The improper arguments of the prosecutor certainly played an important role in their decision. Juries recognize that the interest of the prosecutor's office "in a criminal case is not that it shall win a case, but that justice shall be done". Berger v. United States, 295 U.S. 78, 88 (1934). The law requires that "it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring a just one." Id. at 88. Juries therefore place great weight upon the prosecutor's opinion and assertions of knowledge:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should probably carry none. Id. at 88.

In this case, where a man's life is at stake, the repeatedly improper actions of the prosecutor can hardly be called "harmless error beyond a reasonable doubt". Where serious prosecutorial misconduct is involved, the Fifth Circuit has adopted the Supreme Court's proviso that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." United States v. Hayward, supra at 145, quoting Chapman v. California, 386 U.S. 23 (1967).

The harmless error doctrine is particularly inapposite in this death penalty case. The Supreme Court has observed that "the penalty of death is qualitatively different from a sentence of imprisonment, however long" and accordingly held that "there is a corresponding difference in the need for reliability in the determinative that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Furman v. Georgia, 408 U.S. 38 (1972); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976) (per curiam); Roberts v. Louisiana, 431 U.S. 633 (1977). The prosecutor's inflammatory assertions and objectionable tactics to obtain a death sentence based upon inappropriate considerations violated the Supreme Court's stern admonitions that decisions "to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349 (1977).

II.

PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Among the instances of ineffective assistance of trial counsel were the following:

(a) Trial counsel failed to move for a change of venue, although there was prejudicial pre-trial publicity against Petitioner in Gwinnett County.

(b) Trial counsel filed no challenge to the array of the grand or traverse jury pools in Gwinnett County, although they were subject to challenge for unconstitutional underrepresentation of older persons, Black persons, women and young persons.

(c) Trial counsel failed to conduct an adequate voir dire examination of prospective jurors.

(d) In many instances, trial counsel failed to object to testimony which would clearly have been ruled inadmissible had the objection been made.

(e) Trial counsel presented no evidence on Petitioner's behalf.

(f) Trial counsel's closing argument comprised only one and one-third pages of the trial transcript. On two occasions during his summation, trial counsel admitted his client's guilt. The following constituted the entire closing argument presented to the jury during the guilt-innocence phase of the trial:

> Ladies and gentlemen of the jury, I appreciate your attention, and I won't keep you long because this probably will be one of the shortest closing arguments I have made in a good while. As I explained to you at the outset of this trial, and as the court will charge you, the State must prove each and every allegation in the indictment beyond a reasonable doubt.
>
> The State has presented strong evidence in this case. The defense does not deny this death, does not deny he killed a man.
>
> There are a lot of things that are relevant in this case, but they are not relevant on this stage of the trial, as I explained to you earlier if and when you return a verdict

> of guilty, then when we begin the sentencing stage of the trial and present other evidence at that time and other argument, it will be your duty at that time to decide what punishment to give this man, whether to give him life imprisonment or sentence him to the electric chair.
>
> You have heard all the evidence. Realistically, in all probability, it won't be a real hard decision to make, and of course, I will get an opportunity at a later date to speak to you at great length and present other evidence.
>
> And I do appreciate your attention in this case and I thank you. (Tr. 185-186) (Emphasis added)

(g) During summation in the sentencing phase of the trial, trial counsel disclosed to the jury that he could not enter a guilty plea because the State would not agree to life imprisonment. (Tr. 281)

(h) Trial counsel failed to move the court for funds for experts necessary in the presentation of the defense and in the sentencing phase of the trial.

(i) Defense counsel failed to invoke the rule of sequestration of witnesses. (Tr. 62, 74, 75)

(j) Cumulatively, all acts and omissions of defense counsel as set forth herein, denied Petitioner effective assistance of counsel.

Since Powell v. Alabama, 287 U.S. 45 (1932), and Gideon v. Wainwright, 372 U.S. 335 (1963), it has been firmly established that a defendant charged with a serious crime in state court, has a constitutional right under the Sixth Amendment and due process clause of the Fourteenth Amendment to the assistance of counsel for his defense. This right rests not simply upon commencement of the criminal trial, but at the very outset of criminal proceedings. Powell, supra, 287 U.S. 45, 57. It is not fulfilled merely by the appointment of an attorney or the presence of an attorney at one's side: "Despite there being perhaps some salutary effect from the mere presence of a competent attorney available to a defendant in a criminal proceeding, physical presence alone fails to satisfy the mandate of the

Sixth Amendment." United States v. Woods, 487 F.2d 1219 (5th Cir. 1973). Rather, the Sixth Amendment guarantee is satisfied only when an accused is provided" effective counsel"--that is, "counsel reasonably likely to render, and rendering, reasonably effective assistance" [emphasis in original]. MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), modified on other grounds and affirmed en banc, 289 F.2d 928 (5th Cir. 1961), cert. denied, 368 U.S. 877 (1961).

The guarantee of counsel "reasonably likely to render and rendering effective assistance" (the "MacKenna standard") has been reaffirmed so consistently and so many times that it has become the idiomatic formulation of the Sixth Amendment standard. See, e.g., Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980); Fitzgerald v. Estelle, 505 F.2d 1334, 1338 (5th Cir. 1974) cert. denied, 422 U.S. 1011 (1975); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974).

The distinction between retained and court-appointed counsel as to the degree of protection due the criminal defendant was abolished by this Court in Cuyler v. Sullivan, 446 U.S. 335 , 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). The Cuyler court stated:

> A proper respect for the Sixth Amendment disarms Petitioner's contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. ...Since the State's conduct of a criminal trial itself implicates the State in the defendant's conviction, we see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers. (Emphasis added)

Whenever a person has been convicted of a capital offense, the conduct of his counsel must be strictly scrutinized. Smotherman v. Beto, 276 F.Supp. 579, 586 (N.D. Tex. 1967). This is necessitated by the understanding, expressed by this Court in Gardner v. Florida, 430 U.S. 349 (1977), that death differs from other forms of punishment:

> From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reasons rather than caprice or emotion. 430 U.S. 349, 357-358.

Effective assistance of counsel in a capital case must be assessed with respect to two proceedings which together comprise the defendant's "trial". In the wake of Furman v. Georgia, 408 U.S. 238 (1972), death penalty statutes in Georgia and other states were modified in order to fashion a proceeding that was intended to provide statutorily guided discretion in capital sentencing. Ga. Code Ann. §26-3102.

For assistance of counsel to be effective in a capital case, it must be demonstrably effective in both the guilt/innocence phase of the trial and the sentencing phase of the trial.

This Court has stated repeatedly that the pre-trial phase of a criminal defense is "perhaps the most critical period of the proceedings," a time when "consultation, thorough-going investigation and preparation [are] vitally important." Powell v. Alabama, 287 U.S. at 57; accord, e.g., Von Moltke v. Gillies, 332 U.S. 708, 721-23 (1948). The rationale for this assertion is fundamental: "[a]ny experienced trial lawyer knows that a purported trial without adequate preparation amounts to no trial at all." Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967). The state failed to offer any testimony at the hearing on the petition for writ of habeas corpus that trial counsel prepared the case for trial or took an active posture in defending the case. "The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance," 432 F.2d at 739 (footnote omitted), for any "intelligent and knowledgeable

defense...requires investigation and preparation." Caraway v. Beto, 421 F.2d at 637-38. Trial counsel, Wynn Pelham, testified at the July 14, 1981 hearing on the petition for writ of habeas corpus that he received no money for expenses; he told the family that they could qualify to have counsel appointed; he never discussed the employment of experts with the family nor with Petitioner himself. He further testified that if the family had the funds, he would have employed experts. Moreover, he never interviewed the state's witnesses because he was never contesting Petitioner's guilt.

The Fifth Circuit has consistently and repeatedly held that no attorney can provide "effective assistance" if he fails "to conduct a 'prompt investigation of the circumstances of the case and explore all avenues leading to facts relative to guilt and degree of guilt or penalty.'" Davis v. Alabama, 596 F.2d at 1217 [quoting ABA Standards Relating to the Prosecution Function and the Defense Function Section 4.1 (Tent. Draft 1979)].

Trial counsel did not put Petitioner on the stand and presented no defense at the guilt innocence phase of the trial. Clearly, given the complete absence of any defense witnesses or evidence at trial, the question of whether or not to put Petitioner on the stand was critical to his defense. Bell v. Georgia, 554 F.2d 1360 (5th Cir. 1977). "Informed evaluation of potential defenses to criminal charges" is a "cornerstone of effective assistance of counsel" and "trial counsel's failure to conduct an investigation adequate for the performance of th[is] function[] deprive[s] [the accused] of constitutionally effective assistance of counsel." Gaines v. Hopper, 575 F.2d at 1149-50. Accordingly, the courts have reversed numerous convictions for counsel's failure to fully pursue potential defenses. E.g., Davis v. Alabama, 596 F.2d at 1217-19; Bell v. Georgia, 554 F.2d at 104; United States v. Edwards, 488 F.2d at 1164-65; Roberts v. Dutton, 368 F.2d at 473-74; MacKenna v. Ellis, 280 F.2d at 601. Reversal has been mandated even when the

defense appeared to have no chance of success. See, Gaines v. Hopper, supra, at 1149-50; Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972); Mendenhall v. Hopper, 453 F.Supp. 977, 986-87 (S.D. Ga. 1978), aff'd 591 F.2d 1342 (5th Cir. 1979), and even when, after interviews with his client, counsel was not aware that a foundation for the defense existed. See, Smotherman v. Beto, 276 F.Supp. at 583, 588.

The facts of this case demonstrate that Petitioner was denied effective assistance of counsel at the very strategic pre-trial level. At the hearing on the Petition for Writ of Habeas Corpus, Rev. Harold Turner[3/] testified that trial counsel confided in him that he did not feel he was qualified to try the Baker case.

(b) Failure to file necessary pre-trial motions.

(1) In the present case a jury composition challenge of the traverse and grand jury pools should have been made.

(2) Trial counsel should have filed a motion to change venue in light of the substantial adverse publicity that Petitioner's case had received.

Trial counsel testified that he filed neither pre-trial motion.

(c) Ineffective assistance of counsel during trial.

The many defaults and errors committed during Petitioner's trial, taken together, clearly deprived Petitioner of his right to reasonably effective assistance of counsel guaranteed by the Georgia Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

The record reflects that trial counsel, at best, conducted only a cursory voir dire of potential jurors. Moreover, at no time did he request that the prospective jurors be questioned individually and outside the presence of the entire panel, concerning extremely sensitive questions about their views on capital punishment and whether they could be fair and impartial jurors given the emotional facts of the case.

[3/] Rev. Turner is the Missionary Minister of the Doraville Church of God, Doraville, Georgia, who has been counselling Danny Baker weekly since November of 1978 and has had a positive impact on his life.

During the trial itself, counsel put on no witnesses nor evidence on Petitioner's behalf, not even the testimony of Petitioner himself. Defense counsel neither interviewed the state's witnesses nor conducted an adequate cross-examination (going to the relevant issues involved) of the prosecution's witnesses. Even at the sentencing phase of the trial, the Fifth Circuit Court of Appeals has held in Voyles v. Watkins, 489 F.Supp. 901 (N.D. Miss. 1980) that:

> Effective assistance at this [sentencing] stage, as at other stages requires zealous and not merely perfunctory or pro forma representation...We are faced with a situation where the defense attorneys 'put on what amounts to no defense at all'...we unhesitatingly believe that this lack of defense, at such a critical stage, due to ineffectiveness of counsel, resulted in great prejudice to Petitioner. As the Fifth Circuit has noted, court-appointed counsel 'cannot stand still and do nothing. That indeed might be the best evidence of incompetence, or infidelity, or ineffectiveness, or all three'. Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1965) (Emphasis added)

(d) Ineffective assistance of counsel post-trial.

While defense counsel did file a Motion for New Trial, he did not include as one of the grounds for the motion, ineffective assistance of counsel. A Motion for New Trial is held to be the only post-trial vehicle available for raising a claim of ineffective assistance of counsel in the trial court. Brown v. State, 150 Ga. 585 (1920).

In the instant case, the omissions and errors of trial counsel as set forth above, denied Petitioner effective assistance of counsel as guaranteed by the Sixth Amendment.

III.

THE IMPOSITION OF THE DEATH PENALTY BASED UPON A FINDING OF THE (b)(2) STATUTORY AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT COMMITTED MURDER WHILE ENGAGED IN THE COMMISSION OF ANOTHER CAPITAL FELONY, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE THE ADDITIONAL FELONY IS ARMED ROBBERY WHICH IS NOT NOW A CAPITAL OFFENSE. IN REVIEWING PETITIONER'S DEATH SENTENCE, THE GEORGIA SUPREME COURT DID NOT FULFILL THE FUNCTION MANDATED BY THIS COURT IN GREGG V. GEORGIA, 428 U.S. 153 (1976).

The Georgia Supreme Court's determination that Petitioner committed the crime of murder while he was "engaged in the commission of another capital felony" violates both the Eighth and Fourteenth Amendments because armed robbery is not a "capital felony".

In Coker v. Georgia, 433 U.S. 584 (1977), this Court held that the sentence of death for the crime of rape of an adult woman was grossly disproportionate and excessive punishment forbidden by the Eighth Amendment. The judgment imposing the death sentence in that case was reversed and the case was remanded. The Supreme Court in Gregg v. State, 233 Ga. 117 (1974) held that armed robbery alone does not warrant the death penalty.

The rationale of Coker and Gregg was applied to armed robbery and kidnapping in Collins v. State, 239 Ga. 400 (1977). The Supreme Court of Georgia held that the death penalty may not be imposed for the crimes of armed robbery and kidnapping:

> It follows that there can be no 'conviction of a capital felony' for these crimes within the meaning of the constitutional provision establishing the jurisdiction of the Supreme Court. In our view the expression capital felony when used in our law, is merely descriptive of those felonies to which the death penalty is affixed as a punishment under given circumstances to distinguish such felonies from that class in which under no circumstances would death ever be inflicted as a penalty for the violation of the same...We conclude that convictions of rape, kidnapping and armed robbery under present Georgia statutes are no longer 'convictions of capital felonies' for appellate jurisdictional purposes and jurisdiction of these appeals lies in the Court of Appeals. at 236 S.E. 761. (Emphasis added)

The Court then stated that "on and after August 1, 1977, rape, armed robbery and kidnapping cases shall be docketed in the Court of Appeals," whereas appellate jurisdiction of capital cases rests in the Georgia Supreme Court.

In Peak v. State, 239 Ga. 422 (1977), the Georgia Supreme Court again reiterated the holding in Coker and Collins, that the death penalty may no longer be imposed for crimes of rape, armed robbery and kidnapping. The Court held that the death sentence received for the crime of kidnapping with bodily injury to the victim must be set aside and remanded to the trial court with direction that appellant be resentenced to life imprisonment, the only permissible punishment remaining under the kidnapping statute.

Since Gregg, the Georgia Supreme Court has continued to disapprove the death penalty for armed robbery. However, the Court has continued to recognize armed robbery as a capital offense for the purpose of applying the aggravating circumstance provision of Ga. Code §27-2534.1(b)(2).

A capital felony by definition is a crime for which one can receive a sentence of death. See Ga. Code §26-3102, which defines a capital offense as "an offense which may be punishable by death." The definition of a "capital felony" has been settled in Georgia, if not everywhere else for decades:

> If under any circumstances the penalty of death can be inflicted, the offense is capital, whether it is actually inflicted in a particular case or not. If under no circumstances the death penalty can be inflicted, the offense is not capital. Casear v. State, 127 Ga. 710 (1907)

Accordingly, armed robbery is not a capital felony in the State of Georgia.

Before a convicted defendant may be sentenced to death under the Georgia Death Penalty Statute, the jury must find beyond a reasonable doubt, one of the ten aggravating circumstances specified in the statute. Gregg v. Georgia, 428 U.S

153 (1976). It is axiomatic that the jury must find every element of the offense beyond a reasonable doubt before any criminal sanction can be constitutionally imposed. Therefore, it follows that a jury must find every element of at least one aggravating circumstance beyond a reasonable doubt before a defendant can be sentenced to death. Thus, Petitioner's death sentence cannot rest upon the additional capital felony statutory aggravating circumstance. One element of the offense cannot be proved beyond a reasonable doubt because even if an armed robbery were proved conclusively,[4/] it would not amount to the statutory offense of "an additional capital felony".

The Supreme Court of Georgia has nevertheless taken the view that for purposes of the death penalty statutes, the term "capital felony" includes those felonies such as armed robbery, that the statutes as originally enacted specified as being subject to punishment by death. The Supreme Court of Georgia has maintained that the simple fact that an armed robbery is not a capital felony should not prevent it from holding that an armed robbery is a capital felony for purposes of aggravation. This Lewis Carroll approach to the construction of the State's criminal code exceeds the limits of the due process code.

The branding of armed robbery as something it is not, violates Petitioner's due process rights for an additional reason. The jury may have been led to believe incorrectly that, if Petitioner had committed an armed robbery, he had committed a crime for which he could be punished by death. A jury's belief that a defendant has committed two crimes for which he could be sentenced to death--two capital felonies--inhances the possibility that such a defendant will receive the death sentence for the single capital felony with which he is charged. If a jury's sentencing deliberations are based on the erreonous view

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[4/] Petitioner, however, has consistently contended that no armed robbery was committed.

that a defendant has committed two capital felonies, the defendant is denied a fair sentencing trial.

IV.

THE DEATH SENTENCE AS IMPOSED BY THE JURY WAS IMPROPERLY RECEIVED BECAUSE THE (b)2 AGGRAVATING CIRCUMSTANCE WAS INCORRECTLY STATED. THUS, PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

Georgia Code §26-3102 specifies that "a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed". Therefore, before a convicted defendant may be sentenced to death under the Georgia Death Penalty Statute, the jury must find beyond a reasonable doubt one of the ten aggravating circumstances specified in the statute. Gregg v. Georgia, 428 U.S. 153 (1976). It is axiomatic that the jury must find every element of the offense beyond a reasonable doubt before any criminal sanction can be constitutionally imposed. Therefore, it follows that a jury must find every element of at least one aggravating circumstance beyond a reasonable doubt before a defendant can be sentenced to death.

In the instant case, the State asked for the death penalty on the basis of two aggravating circumstances specified in the Georgia statute: (1) that the murder was committed while the petitioner was engaged in the commission of an additional capital felony, the armed robbery of the victim, and (2) the murder was outrageously or wantonly vile, horrible and inhuman, in that it involved torture to the victim or depravity of mind on the part of the petitioner. With regard to the aggravating circumstance involving armed robbery, the jury actually returned a writing that read: "The offense of murder was committed while the offender to incident the armed robbery of Denris Beatenbo." (Tr. 309) The trial court then inquired:

> THE COURT: I will ask you Mr. Foreman, did you intend to state in your writing "the offense of murder was committed while the offender was engaged in the commission of an additional felony, to wit: the armed robbery?"

MR. FOREMAN: Yes sir.

THE COURT: I believe I am going to let you correct that so that it will include the entire language of the--I think you intended to do so, but I believe you have omitted a sentence in it. You may do it there in your jury box if you see fit. (Tr. 309-310)

Apparently, the jury foreman then changed the language of the jury finding to conform to the instructions of the judge. Most significantly, even the amendment as suggested by the judge failed to conform to the requisite language of the statute because the word "capital" was omitted. Thereafter, the jury was not polled to insure that the entire panel accepted this unusual modification.

The jury's partial recitation of Section (b)(2) did not constitute a suitable finding of statutory aggravating circumstance as mandated by Georgia Code Ann. §26-3102. In his charge, the trial court instructed the jury that if they wished to impose the death penalty, they must record their precise findings as to aggravating circumstance on a furnished form. (Pursuant to Ga. Code Ann. §27-2434.1(c)) Obviously, the jury violated this command. The (b)(2) statement that the foreman returned could hardly constitute "the aggravating circumstance or circumstances which it found beyond a reasonable doubt." Ga. Code Ann. §27-2534.1(c). The jury's confused finding remains a matter of conjecture as to what was actually intended.

It is a well established proposition that ambiguity in a criminal verdict cannot be reconciled unfavorably to the defendant. Simcox v. United States, 571 F.2d 876 (1978); Glenn v. United States, 420 F.2d 1323 (D.C. Cir. 1969). These considerations particularly apply in a death case where the defendant's life rests in the balance. The Georgia Legislature was not content to allow juries to impose a sentence of death by general verdict, but instead has adopted the requirement that "the jury, if its verdict be a recommendation of death, shall

designate in writing...the aggravating circumstance or circumstances which it found beyond a reasonable doubt" Ga. Code Ann. §27-2534.1(c) (1978). Presumably, this additional requirement that the jury specify at least one aggravating circumstance in its own writing was enacted to insure greater reliability in the fact finding and appellate decisions. This safeguard for the defendant is weakened, however, if the State is simply allowed to fill in the gaps in the jury's findings as was done in the instant case, when the court suggested to the foreman that his intent was "the offense of murder was committed while the offender was enaged in the commission of an additional felony, to wit: the armed robbery." (Tr. 309-310)

It is particularly significant that the court instructed only the jury foreman and not the entire jury as to how to amend the (b)(2) finding. The foreman, acting alone, accepted the suggested amendation without any further action by the jury as a whole. The jury was not thereafter told to determine whether in fact the (b)(2) finding as amended, constituted their verdict. Such action denied Baker the right of trial by jury that is mandated by Georgia law in capital cases.

The imposition of the death sentence in the face of the incomplete jury finding of the Section (b)(2) aggravating circumstance failed, in violation of the Eighth Amendment, to insure scrupulously the reliability of the decision to impose the death sentence and undermines Baker's right to have every element of his offense proved beyond a reasonable doubt. In addition, the incomplete (b)(2) finding flouts the State's own procedural rule that capital defendants will be sentenced to death only if all the necessary elements of at least one statutory aggravating circumstance have been specifically found by the jury. As the Supreme Court's recent decision in Hicks v. Oklahoma, 100 S.Ct. 227, 229 (1980) confirms, a Georgia defendant has "a substantial and legitimate expectation" that he

will be deprived of his life only if the state procedural rule is satisfied. This arbitrary disregard of the State's own procedural rule in itself constitutes a denial of due process. Accordingly, the imposition of a death sentence on Baker, based only on a partial and incomplete finding of the Section (b)(2) aggravating circumstance, violated his Fifth Amendment right to due process of law and also constituted a violation of the Eighth and Fourteenth Amendments.

V.

THE AGGRAVATING CIRCUMSTANCE SET OUT IN GA. CODE §27-2534.1(b)(7), UPON WHICH PETITIONER'S SENTENCE IS PARTLY BASED, IS ON ITS FACE, APPLIED IN THE STATE OF GEORGIA, AND AS APPLIED IN THIS CASE, IMPERMISSIBLY VAGUE AND OVERBROAD IN VIOLATION OF THE RIGHTS PROTECTED BY THE GEORGIA CONSTITUTION AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's sentence of death was imposed by the trial court based in part upon a finding by the jury of the aggravating circumstance defined in Ga. Code §27-2534.1(b)(7), which provides inter alia:

> The offense of murder...was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This Court has long recognized that the imposition of the death penalty may not be done in a capricious or arbitrary manner, arising out of passion or prejudice; for to do so is violative of the Eighth and Fourteenth Amendments to the United States Constitution. Furman v. Georgia, 409 U.S. 241 (1972).

The Court in Godfrey v. Georgia, 446 U.S. 420 (1980), set forth two criteria that must be met if the Georgia courts wish to impose a death sentence based upon a finding of the aggravating circumstance under Ga. Code 7-2534.1(b)(7). The first criteria involves the trial court's instructions to the jury. Since the language of Section (b)(7) fails to imply "...any inherent restraint on the arbitrary and capricious infliction of the death sentence", the trial court is required to impose a narrowing construction of Section (b)(7) in its jury charge. The trial court has a constitutional responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" to the jury. Godfrey v. Georgia, supra at 1764-65.

(a) The absence of any jury instructions that channelled the sentencer's discretion by "clear and objective standards"

renders Petitioner's death sentence based on a finding of Section (b)(7) constitutionally defective under the Eighth and Fourteenth Amendments to the United States Constitution.

As this Court previously recognized in reviewing Georgia's death penalty statute, it would be "virtually unthinkable" for a jury to decide whether a person should live or die without "careful instructions on the law and how to apply it". Gregg v. Georgia, 428 U.S 153, 193 (1976).

In instructing the jury, the trial court should ensure that the evidence that the offense was "outrageously and wantonly vile, horrible and inhuman" demonstrates "torture, depravity of mind, or an aggravated battery to the victim". Godfrey v. Georgia, supra at 1776. As in Godfrey, these standards were not used in the present case to delimit Section (b)(7) to the jury. The jury instructions consisted of the trial judge merely rereading the words of Section (b)(7) to the jury, giving no explanation or definition of the Section (b)(7) aggravating circumstance. Repeating the language of Section (b)(7) is clearly inadequate to protect against capricious and arbitrary decisions. The statute offers a jury no guidance concerning its intended meaning, Godfrey v. Georgia, supra at 1765, and when no further guidance is given to the jury, its interpretation of Section (b)(7) "...can only be the subject of sheer speculation". Id. at 1765. The trial court left the jury to its own devices with no guidance on the Section (b)(7) circumstance issue. Quite obviously, the type of reasoned and channelled discretion envisioned in Furman v. Georgia, supra, cannot be obtained through the jury instructions and jury verdict found in this case.

(b) Because of the likelihood that the jury's finding of Section (b)(7) was based on the inappropriate consideration of post-mortem abuse of the victim, the Georgia Supreme Court's reinstatement of Petitioner's death sentence violated the Eighth and Fourteenth Amendments.

The evidence presented at Petitioner's trial was insufficient as a matter of law to prove beyond a reasonable doubt the requisite serious physical abuse of the victim prior to death and, therefore, cannot support the Section (b)(7) circumstance.

The preceding section noted that the jury that imposed the sentence of death on the Petitioner was given no guidance concerning the meaning of the catchall aggravating circumstance. This error of omission was exacerbated by the state's attempt to secure a finding of torture based on the inappropriate consideration of post-mortem conduct in violation of the state's own articulated standards.

The decision in Godfrey noted that, under the Georgia Supreme Court's own "Harris-Blake" standards interpreting Section (b)(7), the existence of torture could not be proved by evidence relating to acts after the victim was dead. Godfrey, 100 S.Ct. at 1776. On remand in this case, the Georgia high court declared: "Godfrey v. Georgia established that torture occurs when the victim is subject to serious physical abuse before death." The uncontradicted testimony of the state's own medical witness revealed that the fourth shot was fired into the victim after his death. Therefore, this shot could not be considered as evidence of torture. Nonetheless, the prosecutor attempted to establish and then vehemently argued to the jury, that the post-mortem shot constituted torture upon which the jury could base a finding of the catchall aggravating circumstance.[5/]

Apparently, the trial judge was misled by the prosecutor's attempt to secure a death sentence based on this inappropriate consideration. In his trial report, the trial judge indicated that the victim had been "physically harmed or tortured" and

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[5/] In his closing argument the prosecutor alluded to Petitioner's shooting the victim "in the privates" and commented: "If that ain't torture, then I don't understand the word torture". (Tr. 276) While the prosecutor tried to inflame the passions and prejudices of the jury by referring to the shot between the legs of the already dead victim as being torturous, it is clear that a dead body does not feel pain. Even the prosecutor conceded this elementary proposition, when, in speaking to the jury of the shot between the victim's legs, he stated, "Sure, he didn' feel it." (Tr. 274)

described the "extent of the harm or torture" as follows: "Defendant fired a shot into victim's genitals as described in the record." Report of the trial judge, January 12, 1979, at 4. In light of the trial judge's exclusive reliance on this post-mortem evidence in describing the conduct that could conceivably be construed as constituting torture and the prosecutor's emphasis of this aspect of the crime, it is reasonable to conclude that the jury was similarly swayed by this inappropriate evidence in returning a finding of Section (b)(7).

The Supreme Court of Georgia attempted to side-step this issue by arguing that, in its view, other evidence of the crime, which the trial judge did not specify as tortuous can be relied upon to affirm the finding of torture. This argument is without merit.

As this Court stated in its initial review of the present Georgia death penalty scheme:

> Where the sentencing authority is required to specify factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

If, as is likely the case, the jury found the post-mortem shot to be the basis of the finding of torture, then the Georgia Supreme Court denied the meaningful appellate review spoken of in Gregg by disregarding the actual grounds for the jury's decision, and affirming the finding on another basis. Furthermore, as this Court observed in Cole v. Arkansas, 333 U.S. 196, 202 (1948):

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law--safeguards essential to liberty in a government dedicated to justice under law.

The prosecutor surely tried this case on the theory that the post-mortem shot evidenced torture; this theory was accepted by the trial judge, and one can only assume, by the jury, as well. Even in its brief submitted to this Court in opposition to Petitioner's initial certiorari petition, the State of Georgia adhered to its position that the post-mortem shot constituted torture.[6/] Brief for Respondent in Opposition to Petition for Writ of Certiorari, Baker v. Georgia, at 12. While in the wake of Godfrey, the Georgia Supreme Court has now conceded that post-mortem evidence cannot supply the basis for a finding of torture, Cole v. Arkansas, supra, establishes that the Georgia Supreme Court is not free to affirm the finding of torture on the basis of other evidence that was not the grounds for the jury's finding.

Moreover, the Georgia Supreme Court cannot simply assume that the jury, unlike the trial judge, considered only pre-mortem acts as evidence of torture. By affirming Petitioner's death sentence on the basis of torture, the Georgia Court has acted in contravention of the unbroken string of cases in which the United States Supreme Court has insisted that no criminal sentence may be upheld on the basis of appellate speculation that a jury that is faced with two alternative theories, one of which is unconstitutional, might have acted on a constitutional basis. Stromberg v. California, 280 U.S. 359, 368 (1931); Williams v. North Carolina, 317 U.S. 287, 291-93 (1942); Cramer v. United States, 325 U.S. 136 n. 45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street

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[6/] It is impossible to know with certainty whether the Georgia Supreme Court's initial opinion even affirmed the existence of torture in this case, let alone what evidence it relied upon. The Court acknowledged Petitioner's argument that no toture occurred, but it relegated the answer to this argument to its "sentence review". The relevant portion of its sentence review misstates both jury findings of the Sections (b)(2) and (b)(7) aggravating circumstances and then concludes that "the evidence supports the statutory circumstances." Since its recitation of Section (b)(7) was in the disjunctive, it is unclear whether the court was affirming the finding of this circumstance on the basis of the existence of torture, depravity of mind, or perhaps even aggravated battery, which had not been found by the jury.

v. New York, 394 U.S. 576, 586-87 (1969); Bachellar v. Maryland, 397 U.S. 564, 569-71 (1970); Eaton v. Tulsa, 415 U.S. 697, 698-99 (1974) (per curiam); Sandstrom v. Montana, 442 U.S. 510, 526 (1979); Chiarella v. United States, 445 U.S. 222, 237 n. 21 (1980). This due process right applies a fortiori in this case because of greater "need for reliability in the determination that death is the appropriate punishment in a specific case". Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Accordingly, the affirmance of Petitioner's death sentence in the face of the jury's inappropriate reliance on post-mortem events as evidence of torture, violates both the Eighth and Fourteenth Amendments.

VI.

THE COURT COMMITTED PREJUDICIAL ERROR IN THAT IT MADE IMPROPER STATEMENTS TO THE JURY DURING THE TRIAL, THUS VIOLATING PETITIONER'S RIGHTS UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

When the State rested its case, the court asked defense counsel to proceed with evidence. When the defense rested without presenting any evidence, the court expressed surprise:

> THE COURT: The State has rested; you may proceed for the defendant, Mr. Pelham.
>
> MR. PELHAM: I would waive opening and reserve the right to conclude.
>
> THE COURT: Defendant has no evidence?
>
> MR. PELHAM: I'm sorry, we rest at this point. We offer no evidence.
>
> THE COURT: Evidence is closed. Defendant has the opening and concluding argument and you waive the opening? (Tr. 180) (Emphasis added)

The defense has no obligation to present any evidence. It is the State that must prove guilt beyond a reasonable doubt. It is therefore, prejudicial error for the court to imply otherwise or draw attention to the failure to present evidence.

Additionally, after the court excused the jury to hear the defense motion to exclude Dr. Dove's opinion testimony (which the court sustained, but the prosecutor and witness ignored), prejudicial error was again committed. When the jury returned, the court implied (perhaps inadvertently) that they might not hear all the evidence against the defendant:

> I just want to explain the procedure, when the court asks you to step out to--so the court can entertain a motion, it's not to hide anything from you in the trial of the case. Sometimes a determination has to be made as to whether certain testimony or articles or things would be admissible, whether it would be legal for you to hear it. So that is the only reason that you are excluded from the testimony from time to time. (Tr. 95) (Emphasis added)

In Crawford v. State, 139 Ga. App. 347, 228 S.E.2d 371 (1976), it was held that a trial court's expression of opinion concerning certain testimony elicited at trial could not be deemed harmless error:

> Our Courts have consistently ruled that an expression of opinion by the court with regard to what had or had not been proved cannot be deemed harmless. (Citations omitted) Id. at 228 S.E.2d 373. (Emphasis added)

The Crawford court quoted the Honorable Benjamin H. Hill, the first Chief Judge of the Georgia Court of Appeals:

> The purpose of the legal inhibition against the expression or intimation of opinion by the judge is to protect a defendant in his weakness, as well as in his strength, and to preserve inviolate the priceless right of trial by jury. The province of the jury as the exclusive arbiters of facts is holy ground, not to be approached by the judge even with bare feet and uncovered head. The judge should sit on the bench the calm and impartial incarnation of law, as silent as the Sphinx on contested questions of fact. Taylor v. State, 2 Ga. App. 723, 729, 59 S.E. 12, 15 (Emphasis added)

The prohibition against comments concerning a defendant's failure to testify applies equally to the court as well as to the prosecutor. Griffin v. California, 380 U.S. 609 (1965); McCann v. State, 108 Ga. App. 316(1), 132 S.E.2d 813, 814. In the instant case, the error is particularly prejudicial because the testimony sought to be excluded was presented anyway in violation of the court's prior order. (See P.19, infra.)

Petitioner's right to have his guilt or innocence determined by an impartial jury was thereby infringed by the trial court's improper and prejudicial statements and Petitioner was denied his rights under the Fifth, Eighth and Fourteenth Amendments.

VII.

PETITIONER'S DEATH SENTENCE SHOULD BE VACATED IN LIGHT OF STEPHENS v. ZANT, 631 F.2d 397 (5th Cir. 1980), rehearing denied and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S.L.W. 3244 (October 5, 1981) (No. 81-89).

In the instant case, the question remains whether the death penalty can constitutionally be imposed when the sentencer indiscriminately invokes two grounds for its imposition and one is invalid.[7/] The substantiality of the question is addressed by the differing views expressed by Justices in passing on post-Godfrey certiorari petitions on November 17, 1980. 49 U.S.L.W. 3370-71. The logic of the position of Justice Stewart, one of those who wrote on that occasion, seems to us unassailable. He pointed out that the sentencer "has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case." Westbrook v. Balkcom, 49 U.S.L.W. 3371, cert. denied, (No. 79-6615, Stewart, J. dissenting). Only the sentencer, then can know how its discretion would be affected by the knoweldge that only one aggravating circumstance and not two were present. To disaffirm a discretionary decision in the circumstances suggested is to act on sheer speculation.

On review, an unexplained discretionary decision cannot rationally be sustained if one of the substantial considerations entering into it is held to be an impermissible consideration. The Fifth Circuit Court of Appeals recently reached that very conclusion in Stephens v. Zant, supra. In that instance, the trial judge permitted the jury to consider four statutory aggravating circumstances. Following trial, and before petitioner's case was reviewed by the Supreme Court of Georgia, that

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7/ Petitioner contends that both the Section (b)(2) aggravating circumstance and the Section (b)(7) aggravating circumstance was defective as a matter of law, and neither could support the death penalty.

Court declared one of the four aggravating circumstances to be unconstitutionally vague. The Georgia Supreme Court eliminated that circumstance from consideration of petitioner's appeal and still found that the evidence supported the jury's findings of the other statutory aggravating circumstances and that the sentence was not impaired. Stephens v. State, 237 Ga. at 261-262, 227 S.E.2d at 263. On appeal to the Fifth Circuit, Petitioner argued that the jury's consideration of the aggravating circumstance (later declared unconstitutional) "create[d] such potential for the intrusion of arbitrary influences into his sentences as to violate his constitutional rights and require his sentence to be vacated." Stephens v. Zant, supra at 405. The court addressed the question "whether the death penalty was invalid under the Constitution because it was imposed when one of the aggravating circumstances was later held to be unconstitutional even though there were two other aggravating circumstances, either of which by itself would be legally sufficient to permit the jury to impose the death penalty and as to both of which there is no uncertainty." Stephens v. Zant, supra at 406.

The court then cited Furman v. Georgia, 408 U.S. 238 (1972) for the proposition that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the penalty will be inflicted in an arbitrary and capricious manner, concluding that "it is impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional aggravating circumstance." Stephens, supra at 406. (Emphasis added) The court held that even if the jurors believed the other aggravating circumstances had been established, it is possible that they would not have recommended the death penalty but for the one aggravating circumstance that was later held to be unconstitutional. Thus, "the jury's discretion here was not sufficiently channeled (see Godfrey v. Georgia, 100 S.Ct. 1759 (1980)) and

that the process in which the death penalty was imposed in this case was not 'rationally reviewable.'" (Citations omitted) Stephens v. Zant, supra at 406.

In the instant case, if the court should determine that the jury improperly relied on either statutory aggravating circumstance submitted for their consideration, then, under the mandate of Stephens v. Zant, Petitioner's death sentence must be vacated. See also Bryson v. Alabama, 634 F.2d 862 (5th Cir. 1981) n. 6 authorizing remand for resentencing in light of Stephens v. Zant, supra). In Stephens, the aggravating circumstance was declared unconstitutional following trial and prior to review by the Georgia Supreme Court. In the instant case, the statute making armed robbery a capital offense, was held unconstitutional long before the trial of Danny Baker. (November 1978) Gregg v. State, supra, held the armed robbery death statutes to be unconstitutional in 1974.

Therefore, under the holding of Stephens v. Zant, supra, because the jury in the instant case considered an unconstitutional aggravating circumstance, Petitioner's death sentence cannot stand.

VIII.

THE INFLICTION OF THE DEATH PENALTY ON A PERSON WHO WAS NINETEEN YEARS OF AGE AT THE TIME THAT THE ALLEGED CRIME WAS COMMITTED, CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner respectfully submits that it is unconstitutional to sentence a nineteen year old to death when he has no prior criminal record and where his first offense was a single homicidal act committed when his culpability was at least partially diminished owing to serious intoxication.

In Eddings v. Oklahoma, 50 U.S.L.W. 4161 (1982), this Court vacated a sentence of death because it "was imposed without 'the type of individualized consideration of mitigating factors... required by the Eighth and Fourteenth Amendments in capital cases.'" At 4161. Although Eddings, a youth of sixteen when the offense was committed, asked this Court to determine whether the Eighth and Fourteenth Amendments prohibit the imposition of a death sentence on a youthful offender, the majority opinion did not reach that issue. Instead, the case was reversed because the trial court failed to consider mitigating circumstances, other than Eddings age, in imposing the death sentence. In the instant case, Petitioner was nineteen years old at the time of the alleged offense and the evidence at the sentencing phase of his trial demonstrated that he had been a victim of violent child abuse. The words of Mr. Justice Powell, writing for the majority in Eddings, supra, are particularly relevant here:

> But when the defendant was sixteen years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.
>
> * * *
>
> But youth is more than a chronologic fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their

> earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. At 4164.

In the instant case, as in Eddings, there was testimony that Petitioner's mental and emotional development "were at a level several years below his chronological age". As Justice O'Connor wrote in her concurring opinion in Eddings, supra:

> Because sentences of death are 'qualitatively different' from prison sentences, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) opinion of Stewart, J.) this court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process, that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake. Surely, no less can be required when the defendant is a minor. At 4165.

Although no longer legally considered a minor at nineteen years of age, Petitioner would respectfully urge the Court to reconsider the question of youth, coupled with the mitigating factors herein demonstrating a cruel and turbulent family history, (see footnote 1, infra), and determine that in the instant case, imposition of the death penalty constituted cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution.

IX.

DURING THE PUNISHMENT PHASE OF THE TRIAL, THE TRIAL COURT FAILED TO CHARGE THE JURY ON THE LAW OF MITIGATING CIRCUMSTANCES, AND FAILED TO CHARGE THAT MITIGATING CIRCUMSTANCES COULD ACT TO OUTWEIGH THE AGGRAVATING CIRCUMSTANCES AND, THUS, REQUIRE A SENTENCE OF LIFE IMPRISONMENT RATHER THAN DEATH. THIS ERROR VIOLATED PETITIONER'S RIGHT TO A RELIABLE, NON-ARBITRARY SENTENCING PROCEEDING, PROTECTION FROM CRUEL AND UNUSUAL PUNISHMENT AND DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The only reference to the law of mitigating circumstances contained in the trial court's pre-sentence charge to the jury is as follows:

> Now, members of the jury, you should consider all of the evidence submitted to you in both phases of this trial in arriving at your verdict as to the sentence to be imposed. This would include any evidence of mitigating circumstances received by you in this case. (Tr. 305)

Immediately upon the conclusion of the charge, the following colloquy took place between the prosecutor, the court and defense counsel when the prosecutor inquired:

> (Whereupon the jury was retired from the jury box.)
>
> MR. HUFF: If Your Honor please, I may have overlooked it, did you define mitigating circumstances to them? Was that in the charge?
>
> THE COURT: I don't know how you define--
>
> MR. PELHAM: There is no legal definition. I think it says anything you want to call them.
>
> THE COURT: I don't know how you define mitigating circumstances, Mr. Huff. It's a matter for the jury.
>
> MR. HUFF: Yes sir.
>
> (Recess) (Tr. 308) (Emphasis added)

The record in the instant case clearly demonstrates that the District Attorney, himself, believed that the Court did not adequately define mitigating circumstances, as such a definition was warranted by the evidence and authorized by Ga. Code §§27-2534.1(b) and (c).

Georgia law has held "that 'to meet the requirements of the Eighth and Fourteenth Amendments, a capital sentencing system must allow the sentencing authority to consider mitigating circumstances'". Hawes v. State, 240 Ga. 327, 334 (1977) quoting from Jurek v. Texas, 428 U.S. 153 (1976). In Hawes, supra, the Supreme Court of Georgia set aside the death sentence for the reason the Court "did not instruct the jury that they should consider mitigating circumstances in arriving at their decision on the appropriate penalty to be imposed." Id. at 334.[8/]

In Flemming v. State, 240 Ga. 142 (1977), the Supreme Court of Georgia explicitly recognized that Georgia's death penalty system requires that the jury consider mitigating circumstances relevant to the defendant. "First, the jury must consider if the state has proven the existence of at least one statutory aggravating circumstance. (Ga. Code §27-2534.1(b)(1-10)), beyond a reasonable doubt. Second, if one of these circumstances is found, the jury must then consider the mitigating and aggravating circumstances relevant to the defendant and determine whether the death penalty is appropriate in this case." 240 Ga. at 147 (Emphasis added). In the instant case, the Court's charge concerning mitigating circumstances failed to convey the necessity for considering mitigating circumstances as defined in Flemming, supra. Moreover, the Court failed to instruct the jury as to the specific evidence to be considered in mitigation. Furthermore, there was a total failure to define the word mitigation, which, contrary to the trial court's assertion "I don't know how you define mitigating circumstances", is clearly capable of definition. It is inconceivable that a jury of twelve average people would completely understand what is required of them when they are told that they should consider "mitigating"

[8/] It is not necessary for a specific request to be made by counsel that the law or existence of mitigating circumstances be charged. Hawes v. State, supra. As well, the issue of failure to charge the law and existence of mitigating circumstances may be raised in habeas corpus in a death case whether objection is made in trial court or not. Stephens v. Hopper, 241 Ga. 596 (1978).

circumstances in deciding whether or not to sentence a defendant to death. Petitioner respectfully submits that in order for the jury to have considered factors in mitigation, it must be clearly informed of its task. The trial court court could have borrowed the following language from this Court which succinctly and clearly defines the Eighth Amendment's requirement of consideration of mitigating circumstances:

> [The Eighth Amendment] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the death penalty. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Furthermore, this Court has stated:

> A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed. Jurek v. Texas, supra, 428 U.S. at 271.

Petitioner respectfully submits that the pre-sentence charge in this case, far from guiding the jury in its deliberations, mandated the return of the death sentence, and flagrantly violated the requirements of the Eighth Amendment to the United States Constitution.

CONCLUSION

Petitioner respectfully contends that serious questions are presented herein concerning the constitutionality of the imposition of the death penalty. His petition should, therefore, be granted.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

By: Mark J. Kadish
MARK J. KADISH

By: Rosalyn S. Kadish
ROSALYN S. KADISH

ATTORNEYS FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1981

No. 81 6657

DANIEL JOSEPH BAKER,

Petitioner

V.

WALTER D. ZANT,

Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Petitioner, DANIEL JOSEPH BAKER, who is now being held in the Georgia Diagnostic and Classification Center, Jackson, Georgia, asks leave to file the attached Petition for a Writ of Certiorari to the Superior Court of Butts County, Georgia, without prepayment costs and to proceed in forma pauperis pursuant to Rule 46 of this Court.

Petitioner's affidavit in support of this Motion is attached hereto. On May 27, 1980, and again in December, 1980, this Court granted a similar motion for leave to proceed in forma pauperis. In addition, a Motion to Proceed in Forma Pauperis was granted in the Superior Court of Butts County, State of Georgia, on April 13, 1981.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.

By: Mark J. Kadish
MARK J. KADISH

ATTORNEY FOR PETITIONER

Suite 700, The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303

(404) 688-2000

CASE NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1981

DANIEL JOSEPH BAKER,

Petitioner

V.

WALTER D. ZANT,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DANIEL JOSEPH BAKER, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? Yes___ No ✓

   (a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. _____

   (b) If the answer is no, state the date of your last employment and the amount of salary and wages per month which you received. ___ December 1977 $4196 .

2. Have you received within the last twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source? Yes___ No ✓

(a) If the asnwer is yes, describe each source of income and state the amount received from each during the last twelve months. _____.

3. Do you own any cash or checking or savings accounts? Yes___ No ✓

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No ✓

(a) If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None ✓

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Daniel Joseph Baker
DANIEL JOSEPH BAKER

State of Georgia
County of _____

Subscribed and sworn to before me
this 29 day of April, 1982.

Claire Register

Notary Public, Lamar Co., Ga.
My commission expires: My Commission Expires SEPT. 20, 1983

243 Ga. 710
BAKER
v.
The STATE.
No. 34588.

Supreme Court of Georgia.

Argued March 13, 1979.
Decided May 31, 1979.

Defendant was convicted in the Gwinett Superior Court, Pittard, J., of murder and armed robbery. His case came before the Supreme Court on direct appeal and for mandatory review of the death sentence imposed. The Supreme Court, Marshall, J., held that: (1) those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute; (2) evidence establishing that homicide victim had been hit with bottle in the face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he and died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim; and (3) the death sentence was not excessive or disproportionate to the penalty imposed upon defendant's accomplice, or to the penalty imposed in other cases.

Affirmed.

1. Criminal Law ⇐1208(6)
Robbery ⇐30

Those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute. Code, § 27-2534.1(b)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1208(1)

Statute authorizing imposition of death penalty where offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim is not unconstitutionally vague. Code, § 27-2534.1(b)(7).

3. Homicide ⇐354

Evidence establishing that homicide victim had been hit with bottle in face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he had died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim. Code, § 27-2534.1(b)(2, 7).

4. Homicide ⇐354

In view of fact that defendant was actual perpetrator of murder and armed robbery, of fact that State did not seek death penalty in codefendant's case and of fact that codefendant was more youthful offender that defendant, defendant's sentence to death was not excessive or disproportionate to penalty imposed upon his accomplice, nor was defendant's death sentence excessive or disproportionate to penalty imposed in similar cases considering both crime and defendant. Code, § 27-2534.1(b)(2, 7).

Wynn Pelham, Lawrenceville, for appellant.

Bryant Huff, Dist. Atty., Arthur K. Bolton, Atty. Gen., Nicholas G. Dumich, Sp. Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

The appellant was convicted of murder and armed robbery. He received a death

sentence for the murder conviction and a sentence of life imprisonment for the armed robbery conviction. His case is here on direct appeal and for mandatory review of the death sentence imposed.

I. Summary of the Evidence.

The evidence authorized the jury in finding the following:

On the evening of May 5, 1978, the victim, Dennis Beatenbo, was drinking at a Holiday Inn adjacent to Interstate 85 in Norcross, Georgia. On this same evening, the appellant and Ricky Massey were drinking and driving in the Norcross-Doraville area. At approximately midnight, the victim left the Holiday Inn to go to his car, which was parked nearby at his place of employment. The appellant and Massey passed Beatenbo en route to his car, and they stopped and offered him a ride. In exchange for the ride, Beatenbo offered the appellant and Massey some liquor which he had in his car. In a confession later given by the appellant to police, he stated that when Beatenbo got out of the car to get the liquor, Massey suggested that they "roll him." The three men began riding around together and drinking, and they drove to an isolated spot near a lake. Beatenbo began to get sick and Massey opened the car door so Beatenbo could get out.

In his confession to police, the appellant stated that as Beatenbo was lying on the back seat with his head hanging down, the appellant hit him over the head with a liquor bottle; that Beatenbo fell out of the car; and that the appellant then took his watch and wallet. As stated by the appellant, "I reached in my belt with my right hand and pulled out my pistol and the guy was still laying [*sic*] on his back. I pointed the gun at the man and I pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something."

Medical testimony established the cause of death as a gunshot wound to the chest. It was also established that the victim had been hit with the bottle in the face, rather than on the back of his head, and that the victim received a total of four gunshot wounds. Three of the gunshot wounds were fired into the victim's chest at point-blank range, and the fourth gunshot was fired between his legs after he had died. The bullets recovered from the victim's body were shown to have been fired from the appellant's gun.

In mitigation, the appellant introduced evidence depicting a rather harrowing history of child abuse.

II. Enumerations of Error.

There are two enumerations of error in this appeal.

[1] 1. First, the appellant argues that the death penalty can no longer be imposed under Code Ann. § 27-2534.1(b)(2) (Ga.L. 1973, pp. 159, 163) on the ground that the murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery, since armed robbery is no longer a capital felony. *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974).

It has already been decided in *Peek v. State*, 239 Ga. 422, 431, 432, 238 S.E.2d 12 (1977) that those crimes which were capital felonies in Georgia at the time Code Ann. § 27-2534.1(b)(2) was enacted, including armed robbery, continue to be "capital felonies" within the meaning of the statute. This enumeration of error is therefore without merit.

2. In the second enumeration of error, the appellant argues that the trial court erred in overruling his motion to strike the statutory aggravating circumstance found at Code Ann. § 27-2534.1(b)(7), which authorizes imposition of the death penalty where "[t]he offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, a depravity of mind, or an aggravated battery to the victim."

[2] The appellant argues that this statutory aggravating circumstance could not support imposition of the death penalty in this case, since there was no evidence of

torture or an aggravated battery to the victim, and since the phrase "depravity of mind" is unconstitutionally vague. The argument that Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague was rejected by the Supreme Court of the United States in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and by this court in *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976) (cert. den., 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 251 (1977)).

Whether the evidence supports imposition of the death penalty under these two statutory aggravating circumstances, which were found by the jury, will be addressed in the sentence review, infra.

III. Sentence Review.

1. Was the sentence of death imposed under the influence of passion, prejudice, or any other arbitrary factor? We conclude that it was not.

[3] 2. Does the evidence support the jury's finding of statutory aggravating circumstances?

In this case, the jury found that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery. Code Ann. § 27-2534.1(b)(2). In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances.

[4] 3. Is the sentence of death excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant?

The appellant's accomplice, Ricky Mansey, was also tried for murder and armed robbery; and Mansey was sentenced to life imprisonment. See *Mansey v. State*, 243 Ga. 228, 253 S.E.2d 196. The initial question presenting itself is whether the appellant's death sentence is disproportionate to the penalty imposed in *Mansey's* case. We find relevant distinctions between *Mansey's* case and Baker's case, which warrant imposing the severer sanction in this case and not in *Mansey's*. First, it is undisputed that the appellant was the actual perpetrator of the murder and armed robbery; whereas, the proof of Mansey's participation in the murder and armed robbery is not so unequivocal. Second, the state did not seek the death penalty in Mansey's case. Third, Mansey is a more youthful offender than the appellant. Mansey was 16 years of age at the time the crimes were committed.

In sum, we find that the appellant's sentence to death is not excessive or disproportionate to the penalty imposed in the case of his accomplice, Ricky Mansey. In determining whether the appellant's death sentence is excessive or disproportionate to the penalty imposed in other similar cases, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find that these similar cases set forth in the appendix support affirmance of the death penalty. Daniel Baker's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; the verdict is factually supported.

We have reviewed the instructions given by the trial judge during the sentencing phase and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977) and *Hawes v. State*, 240 Ga. 227(9), 240 S.E.2d 833 (1977).

Judgment affirmed.

All the Justices concur.

APPENDIX

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1974); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Smith v. State*, 236 Ga. 12, 222

S.E.2d 308 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 249 (1976); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Thomas v. State*, 240 Ga. 390, 242 S.E.2d 1 (1977); *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 393 (1979).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 27, 1980

William H. Allen, Esq.
Covington & Burling
888 - 16th St., N.W.
Washington, DC 20006

RE: Daniel Joseph Baker
v. Georgia
No. 79-5567

Dear Mr. Allen:

The Court today entered the following order in the above-entitled case:

"The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari is granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S.___(1980)."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Deputy Clerk

Appendix B

248 Ga. 259

BAKER

v.

The STATE.

No. 34288.

Supreme Court of Georgia.

Sept. 8, 1980.

Defendant was convicted in the Gwinett Superior Court, Pittard, J., of murder and armed robbery, and he appealed and sought review of death sentence imposed. The Supreme Court, Marshall, J., 243 Ga. 710, 257 S.E.2d 192, affirmed, and defendant sought writ of certiorari. The United States Supreme Court, 446 U.S. 420, 100 S.Ct. 2996, 64 L.Ed.2d 820, vacated and remanded. The Supreme Court held that evidence establishing that homicide victim had been hit with bottle in face, that three bullets were fired into his chest and that after victim was dead, he was shot in scrotum supported jury's finding that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim and, thus, imposition of death penalty was proper.

Reaffirmed.

Homicide ⇐354

Evidence establishing that homicide victim had been hit in face with bottle, that three bullets were fired into his chest at point-blank range and that after victim was dead, he was shot in scrotum, was sufficient to support jury's finding that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim and thus, imposition of death sentence was proper. Code, § 27-2534.1(b)(2, 7).

ADDENDUM TO 248 GA. 710.

By order of the Supreme Court of the United States, this case has, as to sentence only, been vacated and remanded for further consideration by this court in light of *Godfrey v. Georgia*, 446 U.S. 420 (100 S.Ct. 1759, 64 L.Ed.2d 398) (1980); *Baker v. Georgia*, 446 U.S. 961 (100 S.Ct. 2936, 64 L.Ed.2d 820) (1980). Our opinion in this case is reported at 248 Ga. 710, 257 S.E.2d 192 (1979).

In *Godfrey v. Georgia*, supra, the Supreme Court of the United States held that Ga.Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied as to the specific factual circumstance present in that case. Code Ann. § 27-2534.1(b)(7) provides in part: "The offense of murder ... was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The appellant's sentence of death in this case rests partially upon Code Ann. § 27-2534.1(b)(7).[1]

As mandated, we have reviewed the sentence in this case and this court finds material differences between *Godfrey* and the case under review, which distinguish this murder from the murder in *Godfrey* and from other "ordinary" murders for which the death penalty is not appropriate.

The evidence in this case shows that, unlike *Godfrey*, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner. This was a cold-blooded, planned, execution-type murder perpetrated for the purpose of robbing the victim. The appellant lured his victim into his car and, when his victim was helplessly sick from overintoxication, he struck him in the face with a whiskey bottle with

1. The jury found two statutory aggravating circumstances: Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). Under our decisions, the death penalty in this case may be upheld upon § 27-2534.1(b)(2), which we hold in our opinion to have been proven beyond a reasonable doubt. See the addendum to *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 585 (1980) at 245 Ga. 882, 268 S.E.2d 349 (1980), wherein we reviewed a sentence of death in light of *Godfrey v. Georgia*, supra. *Gates v. State*, 244 Ga. 587, 599(8), 261 S.E.2d 349 (1979).

such force that the bottle was broken. The blow produced extensive crushing of the face and nose of the victim. Thereafter, the appellant shot the victim three times in the chest. The barrel of the pistol was placed directly on the chest of the victim as the weapon was fired. After the victim was dead, the appellant shot him in the scrotum.

The appellant stated that he could hear the victim moaning and attempting to say something as he continued to shoot him.

The jury returned a finding that, beyond a reasonable doubt, the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant. As we held in our original opinion, this finding is clearly supported by the evidence as set forth above. *Godfrey v. Georgia* established that torture occurs when the victim is subjected to serious physical abuse before death. *Nance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980). A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

A defendant who mutilates or seriously disfigures the victim's body after death (Cf. Code Ann. § 26-1305) may be found to have a depraved mind.

Under the facts of this case, we find that the murder was of a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim, as set forth above.

Judgment imposing the death penalty reaffirmed.

All the Justices concur.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DANIEL BAKER, PETITIONER VS. WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, RESPONDENT	:	HABEAS CORPUS FILE NO. 5037

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Gwinnett County. Petitioner was convicted of Murder and Armed Robbery. He was sentenced to death for murder and to life imprisonment for armed robbery. His convictions and sentences were affirmed by the Supreme Court. Baker v. State, 243 Ga. 710 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Upon reconsideration the Supreme Court reaffirmed the death sentence. Baker v. State, 246 Ga. 259 (1980). Certiorari was denied by the United States Supreme Court. Baker v. Georgia, ____ U.S. ____, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981).

The Petition, as amended, contains nineteen (19) numbered counts which allege substantive claims for relief. The Court will address these claims for relief by paragraphs corresponding numerically to the counts in the Petition.

The record in this habeas case consists of the transcript of the proceedings before this Court on July 14, 1981, and the transcript and record of Petitioner's trial in the Gwinnett County Superior Court.

I.

In Count I, Petitioner alleges the prosecutor acted improperly, which prejudiced Petitioner's right to a fair trial in violation of his Fifth, Eighth, and Fourteenth Amendment rights.

FINDINGS OF FACT

The Supreme Court has already concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Baker v. State, 243 Ga. at 712.

CONCLUSIONS OF LAW

The argument that is improper is that which introduces facts not in evidence and is calculated to prejudice the defendant, not flights of oratory, figurative speech or false logic. Wheeler v. State, 220 Ga. 535, 537 (1965); Leutner v. State, 235 Ga. 77, 84 (1975).

The Court has examined the closing arguments of the prosecutor in both the guilt/innocence and sentencing phases (T.T. 181-185; 268-280) and found nothing improper. While the prosecutor expressed his personal opinion as to Petitioner's guilt in the guilt/innocence phase, the Court finds the action harmless in light of the fact that Petitioner did not contest his guilt. As to the sentencing phase, the prosecutor was properly arguing for the death penalty and offering plausible reasons for his position. Chenault v. State, 234 Ga. 216, 224 (1975); Redd v. State, 242 Ga. 876, 881 (1979).

Accordingly, the allegations in Count 1 are found to be without merit.

2.

In Count 2, Petitioner claims he was denied effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Wynn Pelham. (H.T. 60, 84). Counsel was retained by Petitioner's adopted mother. (H.T. 60). Mr. Pelham agreed to take the case after being asked to do so by a friend of his who was also related to Petitioner by marriage and had explained that Petitioner's family had little money. Id.

Mr. Pelham has been practicing law since 1966. Id. Since 1975, his practice has primarily consisted of criminal law, approximately 70-75% (H.T. 78-79). Petitioner's case was the third death penalty case Counsel had tried against the prosecutor, Mr. Huff, and Counsel obtained life sentences in the two previous cases. (H.T. 79). He had handled a number of non-capital murder cases. Id.

Prior to trial, Counsel filed Motions. (R. 5, 13-16). He had several discussions with the prosecutor and had complete access to the prosecutor's file. (H.T. 44, 64). Counsel testified that at all times Petitioner never denied his guilt. (H.T. 81). Counsel tried to plea bargain for a life sentence, but the prosecutor refused. (H.T. 44, 73). After discussing the issue with Petitioner, Counsel made a conscious decision not to contest the issue of guilt or innocence or offer any evidence during that phase of the trial. (H.T. 68). This decision was based on the evidence of guilt which appeared overwhelming. (H.T. 80). Instead, the prime goal was to get a life sentence. (H.T. 65). Counsel concluded that for Petitioner to have contested his guilt would have destroyed his credibility; instead, they decided to save Petitioner's credibility for the sentencing phase to ask for a life sentence in view of the fact he had admitted his guilt. (H.T. 80-81).

Counsel interviewed only one State's witness prior to trial because he had reviewed the other witnesses' statements in the prosecutor's file and anticipated their testimony and because he was not going to contest the issue of guilt. (H.T. 64-65). He did interview witnesses who would offer mitigating testimony in the sentencing phase. (H.T. 65). He did not challenge the composition of either the grand or traverse jury because he knew from observing some of the hearings that Team Defense had abandoned a jury challenge in Gwinnett County during the year prior to Petitioner's trial. (H.T. 66). Counsel saw no merit in challenging the admissibility of Petitioner's statement to police. (H.T. 83). He had considered mental incompetency as a potential defense, but the results of Petitioner's evaulation at Central State Hospital negated such a defense. (H.T. 84, 90). Finally, Counsel did not see the need for a private investigator. (H.T. 85).

At trial, Counsel made an opening statement (T.T.65-67); cross-examined State's witnesses (T.T. 74; 77; 85; 89; 100; 102; 117; 137; 153; 168); made motions (T.T. 91; 110; 203); gave argument during the guilt/innocence phase of trial (T.T. 185-186); gave argument during the sentencing phase (T.T. 280-302) as well as presenting two witnesses (T.T. 206; 220) in addition to Petitioner in his own behalf. (T.T. 236).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by

hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. He was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Such decisions as whether to have put Petitioner on the stand or to have asked for funds for experts are among the strategies and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1978). Effectiveness is not measured by how another lawyer may have handled the case. Estes v. Perkins, 225 Ga. 268 (1968); Jones v. State, 243 Ga. 820 (1979).

Accordingly, this claim for relief is found to be without merit.

3.

In Count 3, Petitioner claims the application in this case of the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance is unconstitutional.

While the Court finds Petitioner's arguments persuasive, the Supreme Court has already expressly upheld the jury's finding of the (b)(7) aggravating circumstance. Baker v. State, 246 Ga. 259 (1980).

This finding is binding upon this Court for purposes of habeas corpus review. Elrod v. Ault, 231 Ga. 750 (1974).

4.

See paragraph 3.

5.

In Count 5, Petitioner alleges no armed robbery occurred which, in turn, invalidates the Ga. Code Ann. §27-2534.1(b)(2) aggravating circumstance and his death sentence.

The Supreme Court has already concluded the evidence supported the jury's finding of the aggravating circumstances. Baker v. State, 243 Ga. at 712.

6.

The issue in Count 6 has already been decided adversely to Petitioner on direct appeal. Baker v. State, 243 Ga. at 711.

7.

In Count 7, Petitioner claims his constitutional rights were violated when the trial court received the jury's finding of the (b)(2) aggravating circumstance which was incorrectly stated.

FINDINGS OF FACT

The State sought to prove the existence of two aggravating circumstances, Ga. Code Ann. §27-2534.1(b)(2) and (b)(7). (R. 9). With regard to (b)(2), the jury were charged, "...the offense of murder was committed while the offender was engaged in the commission of

an additional felony, to-wit: armed robbery of Dennis Beatenbo." (T.T. 303-304). The jury were also furnished a copy of the aggravating circumstances. (T.T. 307).

The jury found, as one of two aggravating circumstances returned, "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbaugh." (T.T. 309).

The judge asked the jury foreman if they intended the writing to state, "...the offense of murder was committed while the offender was engaged in the commission of an additional felony, to wit: the armed robbery?" (T.T. 309-310). The foreman answered, "Yes, sir." (T.T. 310). The judge then allowed the foreman to correct the language of the verdict to include the entire language of (b)(2). Id.

CONCLUSIONS OF LAW

Though the jury did not write out the exact language of (b)(2), it was clear to the trial judge and the lawyers present that the jury was basing the aggravating circumstance on the armed robbery of the victim. The intent of the jury being clear, it was not error for the trial court to allow the foreman to correct the verdict. Gates v. State, 244 Ga. 587, 599 (1979).

8.

In Count 8, Petitioner alleges he was indicted and convicted by unconstitutionally composed grand and traverse juries.

Petitioner has shown neither cause, as required by Ga. Code Ann. §50-127(1), nor actual prejudice, as required by Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), in order to pursue his objection to the composition of either jury in this habeas proceeding.

Accordingly, this claim for relief is found to be without merit.

9.

In Count 9, Petitioner claims the admission of his alleged involuntary confession violated his Fifth, Eighth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

At trial, a Jackson-Denno hearing was conducted to determine the admissibility of Petitioner's statement. (T.T. 108-145). The trial court ruled the statement was "admissible and voluntarily made, made after a full explanation of the Miranda rights and it would be admissible in evidence." (T.T. 145).

CONCLUSIONS OF LAW

Petitioner relies upon the recent case of United States v. McCrary, 643 F.2d 323 (5th Cir. 1981), to assert that the waiver of his right to remain silent was invalid because he had not been told he could possibly receive the death penalty.

McCrary does hold that a defendant must know the nature of the offense he is suspected of having

committed before there can be valid waiver. The defendant in McCrary understood he was suspected of drug trafficking and buying and receiving a stolen vehicle. However, the interrogation, to which he had consented, turned out to deal with federal weapons offenses. Such is not the case at hand.

Factual and credibility determinations concerning admissibility of a statement based on voluntariness made by a trial judge are accepted by reviewing courts unless such determinations are clearly erroneous. Johnson v. State, 233 Ga. 58 (1974); Hurt v. State, 239 Ga. 665 (1977).

Petitioner has made no showing that the trial court's determination was in error.

Accordingly, this allegation is found to be without merit.

10.

In Count 10, Petitioner claims the trial court made improper statements to the jury during trial, which violated his constitutional rights. Specifically, Petitioner contends the trial court expressed surprise at the defense resting without presenting any evidence and also implied to the jury they might not hear all evidence against Petitioner.

FINDINGS OF FACT

The statements objected to are as follows:

> "The Court: The State has rested; you may proceed for the Defendant, Mr. Pelham.

Mr. Pelham: I would waive opening and reserve the right to conclude.

The Court: Defendant has no evidence?

Mr. Pelham: I'm sorry, we rest at this point. We offer no evidence.

The Court: Evidence is closed. Defendant has the opening and concluding argument, and you waive the opening?

Mr. Pelham: Waive the opening; reserve the concluding.

The Court: You may proceed for the State."

(T.T. 180-181). (Emphasis added).

"The Court: Ladies and Gentlemen, let me explain. I imagine some of you have never served on a Jury before. How many have served - I just want to explain the procedure, when the Court asks you to step out to - so the Court can entertain a Motion, it's not to hide anything from you in the trial of the case. Sometimes a determination has to be made as to whether certain testify [sic] or articles or things would be admissible, whether it would be legal for you to hear it. So that is the only reason you are excluded from the testimony from time to time."

(T.T. 94-95). (Emphasis added).

CONCLUSIONS OF LAW

Petitioner's allegations are strained interpretations of comments by the trial court. In the first instance, the trial court was simply finding out what procedural steps

the defense had elected to follow. In the second instance, the court was explaining to the jury why they were asked to leave the courtroom. These latter statements would tend to minimize confusion and enlighten jurors who may well have been wondering if they were not hearing everything.

Accordingly, the allegations in Count 10 are found to be without merit.

11.

In Count 11, Petitioner contends the jury charge on malice and intent was impermissibly burden-shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

FINDINGS OF FACT

The jury were instructed on the presumption of innocence, that the State had the burden of proving such essential element of a crime beyond a reasonable doubt, and that the presumption of innocence remained with the defendant throughout trial until and unless the State overcame the presumption through the introduction of evidence sufficient to convict the accused beyond a reasonable doubt. (T.T. 189).

The jury were told the question of intention could only be answered by them; that the acts of a person of sound mind and discretion are presumed to be the product of that person's will, but the presumption could be rebutted; that a person will not be presumed to act with criminal intent, but the jury could find intent upon consideration of the words, conduct, demeanor,

motive, and all other circumstances connected with the act for which an accused is prosecuted. (T.T. 191-192).

The trial court also read the statutory definition of murder and charged that the jury must find malice aforethought, either express or implied, beyond a reasonable doubt before they could find the defendant guilty of murder. (T.T. 195-196).

CONCLUSIONS OF LAW

The jury charge on intent is virtually identical to charges upheld in Skrine v. State, 244 Ga. 520 (1979), and Tucker v. State, 245 Ga. 68 (1980). In both instances, as here, the type of presumption created was merely a permissive one, which the trier of fact was free to reject or apply. Sandstrom v. Montana, supra, is readily distinguished on the ground that Sandstrom's jury "were not told the presumption could be rebutted." 61 L.Ed.2d at 46. Here, jurors clearly were told the presumption could be rebutted.

Petitioner objects to the definitions of express and implied malice in the charge, which are, in fact, the statutory definitions of express and implied malice. Cf. Ga. Code Ann. §26-1101(a). His claim that such definitions are burden-shifting has been previously rejected by the Supreme Court. Cf: Thomas v. State, 240 Ga. 454, 455 (1978); Pulliam v. Balkcom, 245 Ga. 99, 101 (1980).

A jury charge must always be viewed as a whole. Patterson v. State, 239 Ga. 409, 415 (1977); Thomas v. State, supra. When viewed as a whole, a reasonable

juror could not have interpreted the charge as either conclusive or burden-shifting. County Court of Ulster v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Skrine v. State, supra.

Accordingly, this claim for relief is found to be without merit.

12.

In Count 12, Petitioner alleges the Supreme Court's reinstatement of his death sentence without affording him an opportunity to be heard violates his constitutional rights.

The Court is unaware of any such procedural requirement. Accordingly, the allegation is found to be without merit.

13.

The allegation in Count 13 is deemed abandoned because no evidence or argument was presented on the issue.

14.

In Count 14, Petitioner claims that infliction of the death penalty upon a person who was nineteen years old, had no prior criminal record, and whose culpability was alleged to be diminished by intoxication is cruel and unusual treatment under the Eighth and Fourteenth Amendments and the Georgia Constitution.

Juries have imposed the death penalty where evidence presented in mitigation showed a defendant had a very

low intelligence and was socially maladjusted, Corn v. State, 240 Ga. 130, 141 (1977); or had no prior criminal record and was allegedly under the influence of alcohol or drugs at the time of the offense, Bowen v. State, 244 Ga. 495 (1979), Tucker v. State, 244 Ga. 720 (1979). Further, the Supreme Court has already concluded Petitioner's death sentence is "not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." Baker v. State, 243 Ga. at 713.

Accordingly, this allegation is found to be without merit.

15.

Petitioner contends his constitutional rights were violated by the trial court's failure to explain the relationship between aggravating and mitigating circumstances or that mitigating circumstance could act to outweigh aggravating ones to require a life sentence in the sentencing phase.

FINDINGS OF FACT

The jury were instructed that the death penalty could be imposed only if the jury found, beyond a reasonable doubt, one or more statutory aggravating circumstances. (T.T. 303). The jury were told they could recommend life if they did not find any statutory aggravating circumstances. (T.T. 305). They were told they should consider all of the evidence submitted in both phases of trial, which would include any

evidence of mitigating circumstances. Id. The jury were told they were not required to recommend death if they found the existence of aggravating circumstances. Id. They were told the sentence was a matter entirely within their discretion; that they could provide for a life sentence for any reason satisfactory to them or without any reason, if they chose. (T.T. 306). Finally, the jury were told that if the State failed to prove the aggravating circumstances beyond a reasonable doubt, they were not authorized to recommend the death penalty. Id.

CONCLUSIONS OF LAW

There is no requirement that a jury be instructed that mitigating circumstances are to be weighed against aggravating circumstances. Gates v. State, 244 Ga. 587(6) (1979).

Here, the jury was instructed to consider all the evidence in aggravation and mitigation and that they could recommend life even if they found the existence of an aggravating circumstance. The jury was properly instructed as to what to consider in reaching its decision as to sentence. Spivey v. State, 241 Ga. 477 (1978); Gates v. State, supra.

Accordingly, this claim for relief is found to be without merit.

16., 17., 18.

In Counts 16, 17, and 18, Petitioner attacks the constitutionality of Georgia's death penalty statute

in application and theory. Specifically, Petitioner charges the death penalty is administered and applied arbitrarily and capriciously; that his death is being exacted pursuant to a pattern by Georgia authorities to discriminate on grounds of sex, race, and poverty; and, that there are no theoretical justifications for the death penalty.

Petitioner has presented no proof on these issues. Accordingly, these claims for relief are found to be without merit.

19.

In Count 19, Petitioner challenges the constitutionality of Ga. Code Ann. §59-805 governing the use of peremptory challenges. Specifically, Petitioner alleges the statute allows prosecutors to eliminate all blacks from a jury, which deprives a defendant of the right to a fair trial, to a representative cross-section of the community, and to a reliable, non-arbitrary sentencing procedure.

FINDINGS OF FACT

Petitioner's trial counsel testified that the prosecutor used his premptory challenges to strike all blacks from the jury. (H.T. 72).

CONCLUSIONS OF LAW

A peremptory challenge is an arbitrary and capricious species of challenge to a certain number of jurors allowed to the parties within the necessity

of showing any cause therefor. In the very nature of such a challenge no reason need be shown or assigned for the exercise of the right, Hobbs v. State, 229 Ga. 556(6)(1972); Jordan v. State, 235 Ga. 732(1)(1975).

Petitioner has presented no proof of any systematic striking of blacks, a showing which must be made to overcome the presumption that the prosecutor is using the State's challenges to obtain a fair and impartial jury. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Jordan v. State, supra.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found without merit, the Petition is denied.

SO ORDERED, this 14 day of October, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1864

FEB 6 1982

SUPREME COURT OF GEORGIA

ATLANTA, December 3, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DANIEL JOSEPH BAKER V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby DENIED.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Supreme Court of the United States

No. A-713

DANIEL JOSEPH BAKER,

Petitioner

v.

WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 2, 19 82.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 16th day of February, 19 82.

This case involves the following provisions of the Georgia Code:

Ga. Code Ann. § 26-3102

> "Capital offenses; jury verdict and sentence.
>
> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § 27-2534.1

> "Mitigating and aggravating circumstances; death penalty.
>
> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed

while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in change and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond

a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. § 27-2537

"Review of death sentences.

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The Court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."

NO. 81-6657

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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DANIEL JOSEPH BAKER,

Petitioner,

v.

WALTER D. ZANT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether or not comments or arguments by the State Prosecutor operated to deprive Petitioner of a fundamentally fair trial on either the issues of guilt/innocence or sentencing?

2.

Whether or not Petitioner received effective assistance of counsel?

3.

Whether or not, under the facts of this case, Petitioner's death penalty is properly supported in part by the jury's finding of a statutory aggravating circumstance under Ga. Code Ann. § 27-2534.1(b)(2)?

4.

Whether or not the trial court properly acted to permit the jury foreman to correct the written sentencing verdict when it was shown that the written verdict did not truly reflect the jury's intentions?

5.

Whether or not the failure of the trial court to instruct the jury on the specific terminology within Ga. Code Ann. § 27-2534.1(b)(7), and the prosecutor's closing arguments during the sentencing phase of Petitoner's trial, operated to deprive Petitioner of due process in light of the trial court's instructions as a whole, the overwhelming evidence supporting said aggravating circumstance and in light of the detailed review by the Georgia Supreme Court on appeal?

6.

Whether or not the trial judge's comments or his statements to the jury operated to improperly and unconstitutionally prejudice Petitioner?

7.

Whether or not Petitioner's death sentence should be vacated assuming arguendo this Court invalidates only one of the two statutory aggravating circumstances supporting said sentence?

8.

Whether or not under the facts of this case, Petitioner's death sentence constitues cruel and unusual punishment?

9.

Whether or not the trial court's instructions relating to sentencing, and specifically relating to mitigation, were sufficient to insure that Petitioner's due process rights were not violated?

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PART ONE

STATEMENT OF THE CASE

Petitioner, Daniel Joseph Baker, was indicted along with co-defendant Ricky Lee Massey by the March Term, 1978, Gwinnett County, Georgia Grand Jury for the murder and armed robbery of Dennis Beatenbo. Following a jury trial in which the Petitioner was separately tried from his co-defendant, Petitioner was found guilty on both counts and was sentenced to death pursuant to the murder conviction and received a sentence of life imprisonment for armed robbery. The jury found two statutory aggravating circumstances authorizing the imposition of Petitioner's death penalty, those being (a) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant [see Ga. Code Ann. § 27-2534.1(b)(7)], and (b) the offense of murder was committed while the Petitioner had been engaged in the commission of an additional felony, to wit: the armed robbery of Dennis Beatenbo, [see, Ga. Code Ann. § 27-2534.1(b)(2)].

Petitioner's case was automatically reviewed on appeal by the Supreme Court of Georgia, which affirmed his convictions and sentences. Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979). Thereafter, on May 27, 1980, this Court granted Petitioner's application for a writ of certiorari, and vacated Petitioner's death penalty, remanding his case for further review by the Georgia Supreme Court in light of this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Baker v. Georgia, 446 U.S. 961 (1980).

Upon remand, the Supreme Court of Georgia again reaffirmed Petitioner's death sentence. Baker v. State, 246 Ga. 259, 272 S.E.2d 61 (1980), and this Court thereafter denied Mr. Baker's second petition for a writ of certiorari. Baker v. Georgia, 450 U.S. 936 (1981).

On April 2, 1981 the Superior Court of Gwinnett County rescheduled Petitioner's execution date for April 16, 1981. Petitioner then filed a request for a stay of execution and a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. A hearing was held on the state habeas corpus application on July 14, 1981, and on October 14, 1981 said superior court issued an order denying state habeas relief. (See Appendix D to the Petitioner). The Georgia Supreme Court denied Petitioner's application for a certificate of probable cause to appeal on December 3, 1981. (See Appendix E to the Petition). Thereafter, Petitioner filed this third petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

As noted in the previous section, Petitioner was indicted along with co-defendant Rick Massey for the May 5, 1978 murder and armed robbery of Dennis Beatenbo. The evidence shows that during the evening on the aforesaid date, Petitioner and a friend, Rick Massey, had been drinking while driving around the Norcross, Georgia community area. Seeing Dennis Beatenbo walking along the road, Massey and the Petitioner stopped and asked him if he needed a ride. (T. 149-150). In exchange for this ride Beatenbo offered Petitioner and Massey some liquor which was contained in a bottle located in Beatenbo's automobile that had been parked elsewhere. (T. 70, 150, 261). In a statement

to the police, the Petitioner related that when Beatenbo left Massey's car to retrieve the liquor, Massey suggested that they "roll" him. (T. 150). Beatenbo returned and the three men then went for a drive while continuing to consume the liquor. Eventually they drove to an isolated spot at a nearby lake. (T. 150). Thereafter, Beatenbo began to feel nauseated. While Massey opened the back door so that Beatenbo could get out of the car, the Petitioner placed a newly purchased .25 caliber pistol in his belt. (T. 151).

In his confession to the police, Petitioner related that as Beatenbo was lying on the back seat with his head hanging over, Petitioner smashed Beatenbo in the head with the liquor bottle, causing the bottle to break. Beatenbo then raised up and fell out of the other side of the car, lying with his back on the ground. (T. 151, 251). The Petitioner then took the victim's wallet and watch while Massey observed. (T. 151). In Petitioner's own words, "I reached in by belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something." (T. 151). The Petitioner and Massey then split the $22.00 found in the victim's wallet, and drove to Petitioner's trailer. (T. 152). Dennis Beatenbo's body was discovered the next morning. (T. 78).

During the trial, the State Medical Examiner testified that the victim had suffered a crushing blow to his face which broke his nose and damaged his eye and facial tissues. He further testified that the victim had received four gunshot wounds, three of which were the result of the pistol being pressed firmly against the victim's body and fired directly

into his chest. One bullet was also maliciously fired into the victim's scrotum area; however, Dr. Dove theorized that this shot was fired after the victim had died. (T. 97-102). Another State's witness, Bobby Barnes, testified that on Friday, May 5, 1978, the Petitioner had admitted that he killed a man in a robbery by hitting him in the face with a bottle, then shooting him. (T. 82-83). Barnes also testified that he had seen the Petitioner with the gun while at the Petitioner's trailer. (T. 84). After Petitioner's arrest, he informed the police where to find the pistol which was used in the murder, and his co-defendant Massey, led the police to Beatenbo's watch which had been discarded. (T. 132, 162). During the course of police questioning, Baker stated that Massey had never suggested killing Beatenbo, but suggested only that they rob him. It was soley Baker's idea to kill the victim, and when asked why he had done it he answered, "Just to watch him die." (T. 158, 168).

Petitioner was convicted of the murder and following the punishment phase of the trial, the jury found that the death penalty was justified based on two aggravating circumstances, those being: (1) the murder was committed while the Petitioner was engaged in the armed robbery of the victim; and (2) the murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the Petitioner. (T. 309-310).

Additional facts may be recited in the following portion of this Biref when necessary to more fully explain Respondent's argument.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. PETITIONER WAS NOT DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL EITHER DURING THE GUILT/INNOCENCE PHASE OR DURING THE SENTENCING PHASE OF HIS CRIMINAL PROSECUTION FOR ARMED ROBBERY AND MURDER.

Petitioner's first argument attacks the actions of the state prosecutor at Petitioner's trial contending that as a result of said prosecutor's comments and actions, Petitioner was unduly prejudiced and deprived of a fair trial in violation of his Fifth, Eighth and Fourteenth Amendment rights to the United States Constitution. A review of the entire trial transcript, however, amply demonstrates that this allegation is unmeritorious.

In support of this assertion, Petitioner first argues that during the closing argument, the state prosecutor erroneously tendered his own, personal opinion as to the defendant's guilt. The state habeas court made a finding that while the prosecutor had expressed a personal belief as to the Petitioner's guilt during the guilt/innocence phase of the trial, said comment was harmless in light of the fact that Petitioner did not contest his guilt. (See Appendix D of the Petition, p. 9a-10a). Moreover, the state's evidence against the Petitioner was overwhelming, and included his admission of guilt to a private citizen who testified at his trial (T. 82), and which also included his voluntary confession to the police. (T. 148-152).

Here, Petitioner cites one sentence, taken out of context, to support his position that the state prosecutor imposed his personal opinion as to the Petitioner's guilt upon the jury. A review of the record shows that immediately before and immediately after the challenged statement, the prosecutor reminded the jury that the state was required to prove guilt beyond a reasonable doubt. The prosecutor stated:

> Witnesses, State is required to prove the guilt beyond a reasonable doubt. No need in bringing in all the witnesses and every possible witness, every Tom, Dick and Harry that is of some insignificant consequence.
>
> I don't believe there is any question in this case, not only beyond a reasonable doubt, but beyond any doubt in this case that this Defendant committed the murder and armed robbery of Dennis Beatenbo.
>
> The law says we are required to prove it beyond a reasonable doubt. In this case I submit to you under the evidence, is beyond all doubt. No doubt that he committed the offenses. (T. 184-185).

Of course, before improper jury argument may be a basis for federal habeas corpus relief under 28 U.S.C. § 2254, the argument must be so prejudicial that the applicant's state trial was rendered fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Alverez v. Estelle, 531 F.2d 1319, 1323 (5th Cir. 1976). It is well established that in reviewing

prosecutorial actions for possible prejudice, each case must be considered on its particular facts. The prosecutor's comments must not be considered in isolation from the remainder of the trial. The comments must be evaluated in the context of the trial as a whole. Cobb v. Wainwright, 609 F.2d 754 (5th Cir. 1980), cert. den., 447 U.S. 907 (1980).

Counsel's arguments should not contain his own comments or opinions about the merits of the case or as to his personal opinion on the defendant's guilt. United States v. Rodriquez, 585 F.2d 1234, 1243 (5th Cir. 1978). However, a prosecutor's expression of personal belief may, in some cases be tolerated, if it is based solely upon the evidence introduced and the jury is not led to believe that other evidence, unavailable to them, justifies the belief. Id., at p. 1243. In assessing the potential prejudicial impact of any improper comments relating to personal belief on the guilt of the accused, the comments must be considered in light of the strength of the totality of the evidence against the defendant. Id., at p. 1244, accord, United States v. Dorr, 636 F.2d 117, 121 (5th Cir. 1981); Berger v. United States, 295 U.S. 78, 89 (1935).

Here, a review of the prosecutor's comments reflects that, in actuality, he was referring to the overwhelming amount of evidence produced by the state which eliminated all question beyond a reasonable doubt of the defendant's guilt. Moreover, even if this Court should find that the prosecutor's comments were some reflection of his personal opinion, in light of the overwhelming accumulation of evidence which went unrebutted at trial, the aforesaid comments by the state prosecutor, would, at most, have been harmless error.

Secondly, Petitioner asserts that the prosecutor suggested to the jury that it had not heard all of the evidence. He cites page 181 of the prosecutor's arguments and quotes the statement, "Obviously I did not tell you everything, . . ." Again, the statement cited by the Petitioner is taken out of context. In the immediately preceding paragraph, the prosecutor referred to his opening statements to the jury wherein he stated the state would prove that Petitioner committed the offenses of armed robbery and murder, and the circumstances of the crimes. When the prosecutor stated, "Obviously I did not tell you everything, but as the evidence came earlier it won't take as long.", the prosecutor was referring to his opening statement to the jury.

Petitioner also refers to the comment on page 184 where the prosecutor stated:

> Witnesses, State is required to prove the guilt beyond a reasonable doubt. No need in bringing in all the witnesses and every possible witness, every Tom, Dick and Harry that is of some insignificant consequence." (T. 184).

As the state prosecutor testified at the state habeas proceeding, this reference to not calling every possible, insignificant witness was made simply because the names of numerous other people were mentioned during the testimony at trial and the state prosecutor was simply saying that although he had the burden to prove guilt beyond a reasonable doubt, there was no burden upon him to bring in every witness of insignificant consequence. (HC. 42-43). The prosecutor

obviously was not intending to infer to the jury that there was even more evidence which they could have, but which they did not present to show Petitioner's guilt. At most the comments could be interpreted as indicating that there may have been some additional witnesses, but these witnesses would have been insignificant to the case. This did not prejudice the Petitioner, and in no way deprived him of a fundamentally fair trial.

Likewise, the comments of the state prosecutor during the sentencing phase of the trial did not amount to suggestions that the jury did not hear all of the evidence which may have been unfavorable to the Petitioner. The state prosecutor's comment during closing argument of the sentencing phase of the trial as reflected on page 273 of the transcript was simply a comment upon why the state had not presented witnesses during the sentencing phase. This was because the state had no idea what sort of evidence the defendant would tender. The prosecutor's comments were not attempts to insinuate that the witnesses' credibility could have been attacked through the testimony of uncalled state witnesses. The case of Ginsberg v. United States, 257 F.2d 950 (5th Cir. 1958), cited by Petitioner, is distinguishable from the instant case, because the prosecutor there specifically stated,

> Now with respect to character witnesses Mr. Fowler had stated that Mr. Worton [the prosecutor] didn't produce anybody who would say that he is a bad man. . . I could probably have fifty people in here who would show that he isn't a good character. I'm not trying Mr. Ginsberg's character. . . . Id., at p. 954.

Here, the prosecutor made no such comments that he had numerous witnesses who could probably have rebutted Petitioner's character witnesses, but he was simply implying that he had no opportunity to present any rebuttal witnesses since he had no idea as to what the defense witnesses were going to say.

In any case, this one comment by the prosecutor again is simply insignificant when compared to the evidence produced at the entire trial, and did not deprive Petitioner of a fundamentally fair sentencing proceeding or due process of law.

Petitioner's third allegation of prosecutorial misconduct asserts that he was prejudiced as a result of the state prosecutor's comments which referred to facts outside of the record and the result of the prosecutor's misstating evidence. As his first example he cites the prosecutor's statements on page 273 of the trial transcript, wherein the prosecutor stated,

> What about Dennis Beatenbo? He's got a family, sisters and brothers, a mama and a daddy here. He worked in the construction work, and, you know, he worked there for the last eight years. Tough life. Full of life. Enjoyed life. (T. 273).

First of all, Petitioner misstates that the prosecutor argued "that the victim had a fine family and was a good worker . . ." (Petitioner's Brief, p. 14). Petitioner misstates that there was no evidence in the record to support the aforesaid statements by the prosecutor. For example, witness John D. Smith did testify that Dennis Beatenbo had been employed for the previous eight years as a construction worker installing pipes

on a pipe line. (T. 68). Witness Dean Bain also testified that he had known and worked with Dennis Beatenbo, and had been drinking with him at a local Holiday Inn from 6:00 p.m. until approximately 12:00 a.m. on the day before the murder. (T. 75-76).

Certainly, it could also be inferred that Dennis Beatenbo had a family, a mother and a father. The prosecutor's further statements that he had sisters and brothers simply do not rise to any constitutional deprivation. Furthermore, contrary to the Petitioner's contentions, the prosecutor did not make any comments at all pertaining to the good qualities of the victim's family.

Although Petitioner asserts that the prosecutor erroneously expressed his own opinion during the guilt/innocence phase of the closing argument, when he stated that the Petitioner wanted to see if his gun would kill a human being and that the Petitioner appeared to be proud of the murder, it is clear from a review of the record that these statements were obvious inferences which could have been drawn from the evidence. For example, following the murder Petitioner freely admitted to witness Bobby Barnes how he had killed Dennis Beatenbo by hitting him in the face with a bottle and shooting him. Petitioner also told Barnes that he had taken $22.00 from the victim. (T. 82-83). In his confession to Officer Phillip Whitley, Petitioner told how he had shot the victim, "Just to watch him die." (T. 168).

Although Petitioner asserts that the prosecutor made references to his own family life, comparing it to that of the Petitioner, a review of the record shows that such references

were quite brief, and only by the wildest stretch of the imagination can it be concluded that they were in any way prejudicial. For example, Petitioner refers to the prosecutor's comments on page 272 of the trial transcript. There the prosecutor stated,

> To be sure, the Defendant probably was not raised the way you and I were raised, and I use the word raised instead of reared because when mama and daddy run the store down there they raised the kids. (T. 272).

If anything, the aforesaid comment by the prosecutor was beneficial to the Petitioner, because the prosecutor inferred to the jury that it was obvious that the Petitioner did not have a normal family life. The further comments by the prosecutor were so trivial so as to not merit any additional comment herein. Likewise, the comments on page 276 of the trial transcript wherein the state prosecutor made miniscule references to his own family did not overstep the bounds of proper prosecutorial argument. A review of the transcript shows that the prosecutor stated,

> All of his grownup life he had the benefits of what I would call maybe not the best mama, but what is the best mama in the world? I think I had the best one. I'm sure Ms. Baker did the best she could and gave him everything she could. But you heard him. He said I was just -- well, you know, it first came out Ms. Baker, well, he had a little problem, a little scuffle or little thing, you know, I had to bring out,

you know, he beat his daddy up so bad it broke his jaw and sent him to the hospital. (T. 276-227).

Likewise, the prosecutor's slight misstatement that the Petitioner had dragged the body a short distance really could not have had any bearing on the jury's ultimate sentence determination, when the evidence overwhelmingly showed that the Petitioner maliciously smashed a whiskey bottle into the face of the victim, and while the victim was lying helpless on the ground placed a revolver directly against his chest and fired three times, and thereafter fired an additional time into the victim's scrotum.

Petitioner also contends that the prosecutor improperly injected his personal knowledge about a disputed matter into evidence. A review of the transcript again, shows that this criticism of the state prosecutor is unwarranted and unsupported by the record.

On direct examination, the victim's mother testified that she learned about her son's participation in the murder while she was home alone. She insinuated that someone had simply called her and coldly told her that her son had shot someone in the head and killed him, that the victim was drunk and her son was sober, and that her son "blew the head off or shot him in the face . . ." On cross-examination, the prosecutor simply elicited the truth about how he had called her, had told her he had some bad news to give her, that he had attempted to get in touch with some of her relatives because he knew she was alone, and that he had called neighbors to come be with her. Petitioner's assertions that the prosecutor was attempting

to infer to a jury that he was a fair, reasonable and sensitive man and that he "apparently suggested to the jury that such a considerate man would not request the death penalty unless it was necessary," is simply unfounded speculation.

Likewise, Petitioner erroneously states that the prosecutor induced a government witness to express a prejudicial opinion. A review of the record shows that to the contrary, the prosecutor attempted to stop the witness from making any prejudicial statements. Prior to the testimony of Dr. Donald Dove, the Medical Examiner, the defense moved the court to prohibit witness Dove from testifying, as he had done in a previous trial, that the fourth shot to the victim's scrotom was not meant to inflict death, but was only meant to inflict pain, and was fired in an effort to determine whether or not there was still life in the body. (T. 92-93). The trial court agreed with the defense that testimony as to the defendant's intent should be left out; however, the court agreed with the district attorney that the doctor could testify that the type of wound was not the type of wound that would inflict death.

The questioning of Dr. Dove, in no way substantiates Petitioner's contention that the prosecutor elicited any improper testimony. Petitioner does not cite the actual testimony of Dr. Dove. The following transpired:

> Q. [District Attorney Huff]: Okay. Now, if the evidence and testimony in this case showed that he had been knocked out and rendered unconscious and was lying prone, do you have an opinion from your autopsy report -- from your

autopsy then how the gunshot would have entered through the scrotum and up in there?

A. [Witness Dr. Dove]: Well, I'm certain that the gun was just placed in this position and fired in this position. Of course, it was not meant to --

Q. You can't do -- you can't go into that -- now --

A. Okay.

MR. PELHAM. [Defense Counsel]: Your Honor --

THE WITNESS: This of course was not an effort to kill the individual, it's not the type wound that would kill him.

MR. PELHAM: Your Honor --

THE COURT: I will strike that it was not an attempt, but he can say -- he can say what type wound it was.

MR. PELHAM: Yes, sir, I think he had already said that, I believe.

THE COURT: The jury will disregard the conclusion that what effort was made, but may consider what type wound the doctor said it was. (T. 99).

Thus, the aforesaid testimony shows that the district attorney was simply attempting to elicit how the fourth shot was fired, and he further attempted to stop the witness from testifying as to any opinion pertaining to the intent

of the defendant when he fired that fourth shot. This is also substantiated by District Attorney Huff's testimony at the state habeas hearing. When asked what he was attempting to elicit from the witness with his questioning, he stated:

> I was attempting to elicit from the doctor his opinion that the gun would have had to have been brought down, between the legs and fired to go up into the body, since he was lying on the prone, rather than standing up over him and shooting through the scrotum.
>
> In other words, this bullet did not traverse the body from above downward, it traversed the body parallel with the ground which laying -- I was merely asking him what position would the gun have had to have been in for the projectile to have entered the scrotum and gone and trajected the victim's body in that manner. (HC. 52).

Thereafter, the prosecutor specifically and unequivocally stated he was not attempting to elicit any testimony pertaining to the state of mind of the Petitioner when the shot was fired. (HC. 53).

Petitioner also asserts that the prosecutor improperly related to the jury his personal opinion as to aggravating circumstances and "other matters" which were to be decided by the jury.

A review of the alleged improper comments in the context of the entire record shows that they were either reasonable inferences from the evidence, were supported by the evidence, or were proper arguments to the jury urging them to impose capital punishment.

Under Georgia law it is permissible for a prosecutor to argue for the death penalty, and to offer plausible reasons for his position. Chenault v. State, 234 Ga. 216 (7), 215 S.E.2d 223 (1975); Strickland v. State, 209 Ga. 675 (2), 75 S.E.2d 6 (1953); Allen v. State, 187 Ga. 178, 182, 200 S.E. 709 (1938). Additionally, a prosecutor may urge that the jury impose strict punishment. Chenault, supra; Bailey v. State, 153 Ga. 413, 414 (4), 112 S.E. 453 (1922); Coker v. State, 234 Ga. 555, 573, 216 S.E.2d 782 (1975), sentence rev'd on other grounds sub nom, Coker v. Georgia, 433 U.S. 584 (1977). Here, the district attorney's arguments were simply attempts to persuade the jury that there were sufficient circumstances which authorized capital punishment in this case.

Petitioner's assertions that the prosecutor improperly utilized inflammatory language by labeling defendant as "one mean man," or that he referred to alleged prejudicial terms such as "pumped him full of bullets" or "blowing him away" are unmeritorious since the comments were fully supported by the evidence. Moreover, there was no objection to the terminology used, and it was not so prejudicial as to deprive Petitioner of a fundamentally fair sentencing hearing.

Petitioner asserts that the prosecutor improperly made a "deterrence argument" by urging the jury to render the

consciousness of the community based on alleged irrelevant matters, does not truly reflect the prosecutor's statement. In fact, he stated, "Your verdict should and ought to seek and do nothing more than render the conscious [sic] of this community as to what the appropriate penalty is for this defendant for this crime." Thus, the prosecutor was urging the jury not to base its decision upon wholly irrelevant considerations as Petitioner suggests, but he was urging the jury to focus upon this defendant and the circumstances of this crime. Petitioner's references to an article written by the prosecuting attorney in September of 1975 or 1976, several years before the Petitioner's trial, is completely irrelevant and immaterial to this case.

In conclusion, Respondent submits that since Petitioner's arguments, that he was unconstitutionally prejudiced by the district attorney's comments in this case, are unsupported by the record, and since the record, in fact, shows that Petitioner was not deprived of a fundamentally fair trial on either the guilt/innocence issue or in the sentencing proceeding, this Court should refuse to grant certiorari to review Petitioner's first issue.

II. THE STATE HABEAS CORPUS COURT'S FINDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE PRESENTED AT THE STATE HABEAS PROCEEDING.

Under Petitioner's second argument he sets forth nine areas wherein he claims he received ineffective assistance of counsel. A review of the record of Petitioner's trial, and review of testimony at the state habeas proceeding, shows that the state habeas court properly found that Petitioner failed to carry his burden of proof on this issue.

Petitioner initially asserts that trial counsel failed to file proper pretrial motions such as a challenge to the grand and traverse jury pools in Gwinnett County, Georgia and further failed to file a motion for change of venue.

Pertaining to the failure of Petitioner's trial attorney to file a motion for change of venue, at the state habeas hearing Petitioner was able to introduce only two very short newspaper articles which referred, in part, to Petitioner's indictment and trial. Neither article was prejudicial to the Petitioner. (HC. 155-156). Additionally, there was testimony at the state habeas proceeding from the district attorney who stated that the pretrial publicity in Petitioner's case was minimal in relation to normal homicides which had occurred in Gwinnett County, Georgia. In the words of the district attorney, ". . . there just wasn't anything unusual about the case that generated any widespread publicity on the case." (HC. 46).

Petitioner's trial attorney testified at the state habeas proceeding that he saw no basis to attack the grand or traverse jury pools. Both he and the district attorney testified that a previous challenge to the Gwinnett County jury pools had been made by a criminal defense orgainzation shortly before Petitioner's trial, and upon investigation, the challenge was finally dropped. (HC. 47, 66, 82). Additionally, Petitioner presented no evidence at the state habeas proceeding to support his contention that the Gwinnett County jury pool was unconstitutionally composed in any respect.

Petitioner also raises several contentions of ineffective assistance of counsel during trial. These criticisms relate to the way counsel conducted his jury voir dire, counsel's failure to object to certain evidence, counsel's failure to present no evidence during the guilt/innocence phase of Petitioner's trial, counsel's summations to the jury during both the guilt/innocence phase and the sentencing phase of the trial, counsel's failure to move for funds for expert witnesses and counsel's alleged failure to invoke the rule of sequestration.

All of these issues pertaining to counsel's actions at trial relate to trial tactics and the manner in which Petitioner's particular attorney decided to conduct his case. Petitioner's contention that the jury voir dire and summation arguments were cursory or ineffectual, are simply the opinion of Petitioner's present attorneys. Counsel presented no evidence in Petitioner's defense during the guilt/innocence phase of the trial, because he had no evidence to present although he engaged in a detailed investigation of the case. (HC. 86-87). Moreover, Petitioner

never denied his guilt in the case, and he concurred in the decision of the trial attorney not to testify or present evidence in an attempt to show his innocence. (HC. 68, 81). Since the evidence was so overwhelming in favor of the state, the defense counsel determined that Petitioner would lose credibility and sympathy with the jury by attempting to assert that he had not committed the crime. Defense Attorney Pelham was most concerned about the sentencing phase of the trial, since it was virtually assured that Petitioner would be found guilty. He also geared his closing arguments, even during the guilt/innocence phase of the trial, to an attempt at alleviating the potential outrage which the jury might show against his client because of the facts.

Although Petitioner asserts that defense counsel did not invoke the rule of sequestration of witnesses, the record shows that he was specifically asked by the court if he requested said rule to be invoked, and defense counsel indicated that he did. (T. 61). Simply because defense counsel failed to object to one of the early witnesses who inadvertently violated the rule, does not show ineffectiveness. This is especially true when the witness who violated the rule was only the second witness who was called, and who could have only heard some prior testimony pertaining to where the victim had been prior to the murder. Moreover, even if the witness had violated the rule of sequestration his testimony was still admissible under Georgia law. Dudley v. State, 148 Ga. App. 560(3), 251 S.E.2d 815 (1978).

The standard for effective assistance of counsel under the Sixth Amendment of the United States Constitution appears

to be now well established. A criminal defendant is entitled to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (1980). Of course, the standard does not require errorless counsel, nor counsel judged ineffective by hindsight. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial, and the entire record must be considered in examining the performance of counsel. See, e.g., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974). "It is within this framework of the totality of circumstances, that we judge the 'fundamental fairness' of the trial, and ultimately counsel's ineffectiveness." Nelson v. Estelle, supra at p. 906.

Here a review of the entire record and Attorney Pelham's testimony at the state habeas hearing, amply demonstrates that Petitioner received effective assistance of counsel in accordance with the federal standards. Thus, certiorari should not be granted to review the second issue which Petitioner raises.

III. THE GEORGIA SUPREME COURT PROPERLY PERFORMED ITS REQUIRED DUTY TO REVIEW PETITIONER'S DEATH PENALTY IMPOSED UNDER GEORGIA'S CAPITAL PUNISHMENT STATUTORY PROCEDURE, AND PROPERLY AFFIRMED THE JURY'S FINDING IN THE INSTANT CASE THAT THE EVIDENCE SHOWED SUFFICIENT STATUTORY AGGRAVATING CIRCUMSTANCES UNDER GA. CODE ANN. § 27-2534.1(b)(2) WHICH CONTRIBUTED TO THE IMPOSITION OF THE DEATH PENALTY AGAINST THE PETITIONER.

Petitioner's third argument in support of his petition contends that since the death penalty may no longer be imposed for the offense of armed robbery in Georgia [Collins v. State, 239 Ga. 400, 404, 236 S.E.2d 759 (1977)], it is no longer a capital felony, and therefore, may not be utilized under Ga. Code Ann. § 27-2534.1(b)(2) as a statutory aggravating circumstance supporting the imposition of the death penalty. This precise issue was raised in Petitioner's first petition for a writ of certiorari before this Court; however, this Court obviously rejected this argument, vacating the sentence and remanding instead for review in light of this Court's ruling in Godfrey v. Georgia, 446 U.S. 420 (1980). See Baker v. Georgia, 446 U.S. 961 (1980) [Petition No. 79-5567]. Petitioner has tendered no new arguments which would justify this Court's reviewing this issue at this time.

In Peek v. State, 239 Ga. 422, 238 S.E.2d 12 (1977), cert. den., 439 U.S. 882 (1978), the Georgia Supreme Court

specifically addressed the aforesaid issue. This issue presented a question of statutory interpretation to the state court, and it concluded as follows:

> We construe 'capital felony' as that term is used in § 27-2534.1(b)(2) in a generic sense to include those felonies which were capital crimes in Georgia at the time this section of our death penalty statute was enacted. Id., at p. 432.

The Georgia Supreme Court has continued to consistently hold that armed robbery is a capital felony for the purpose of finding aggravating circumstances. See Bowden v. State, 239 Ga. 821, 829, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978); Davis v. State, 241 Ga. 376, 384, 247 S.E.2d 45 (1978), cert. den., 429 U.S. 122 (1978); Young v. Ricketts, 242 Ga. 559, 562, 250 S.E.2d 404 (1978), cert. den., 442 U.S. 934 (1979); Baker v. State, 243 Ga. 710, 711, 257 S.E.2d 192 (1979), sentence vacated on other grounds, Baker v. Georgia, 446 U.S. 961 (1980); Cobb v. State, 244 Ga. 344, 356-357, 260 S.E.2d 60 (1979).

Armed robbery was an aggravating circumstance supporting the death penalty in Gregg v. Georgia, 428 U.S. 153, 161 (1976), and in the case of Coker v. Georgia, 433 U.S. 584 (1977). This Court recognized without disapproval that under Georgia law armed robbery is considered a capital felony for the purpose of applying the aggravating circumstance provision of the Georgia Code. Id., at p. 599, n. 15.

In holding that armed robbery may be considered a capital felony for the purposes of Code § 27-2534.1(b)(2), the Georgia Supreme Court has correctly applied the basic premise that the objective of a court in construing statutory construction is to ascertain the intent of the Legislature and to give effect to that legislative will. Philbrook v. Glodgett, 421 U.S. 707 (1975).

Thus, for the aforesaid reasons, Petitioner's contentions under Section III in support of his application for a writ of certiorari, should be found to be unmeritorious.

IV. THE TRIAL COURT PROPERLY PERMITTED THE JURY TO CORRECT ITS SENTENCING VERDICT IN PETITIONER'S CASE.

Under Petitioner's fourth argument he asserts that because the jury initially drafted an insufficient verdict pertaining to Ga. Code Ann. § 27-2534.1(b)(2), that aggravating circumstance could not support Petitioner's death penalty.

A review of the record shows that upon reaching its verdict during sentencing pertaining to the (b)(2) aggravating circumstance the jury recommended death and found that, "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbaugh." (T. 309). At that time the jury also made a finding under the (b)(7) aggravating circumstance.

The trial judge immediately questioned the jury foreman as to the form of its verdict on the (b)(2) aggravating circumstance. The foreman indicated that he had intended, in his writing, to

state that the murder had been committed while the Petitioner had been enaged in an armed robbery. The court allowed the correction to be made. (T. 309-310).

Under Ga. Code Ann. § 110-105, "Verdicts shall have a reasonable intendment, and shall receive a reasonable construction, and shall not be avoided except by necessity." See Jackson v. Houston, 200 Ga. 399, 400, 375 S.E.2d 399 (1946). If the meaning of a verdict is clear, the misuse of words or errors in spelling or grammar will not invalidate it. Id. Jury verdicts should be construed with reference to the indictment, the court's instructions, and the entire record to arrive at the intention of the jury, and all intendments should be made to sustain the verdict. United States v. Nooks, 446 F.2d 1283 (5th Cir. 1971), cert. den., 404 U.S. 945 (1971).

It is clear here that the trial court merely permitted the foreman to correct the verdict which he had erroneously drafted. Under such circumstances, this Court need not grant the petition for a writ of certiorari to review Petitioner's fourth issue.

V. THE SUPREME COURT OF GEORGIA PROPERLY AFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7).

Under Petitioner's fifth argument, he contends that certiorari should be granted to review Petitioner's death sentence which is based in part upon a jury finding that statutory aggravating circumstances existed under Ga. Code Ann. § 27-2534.1(b)(7). Petitioner asserts that the trial court erroneously failed to instruct on the terminology of the (b)(7) aggravating circumstance, and additionally asserts that because of the trial court's alleged failure to render proper instructions and as a result of the prosecutor's arguments to the jury there is a strong likelihood that the death penalty in this case was based upon an inappropriate consideration of post-mortem abuse of the victim.

As has previously been noted, following the sentencing portion of Petitioner's trial, the jury returned a death penalty verdict based in part upon its finding that the murder in this case was "outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the Defendant." (T. 309). See Ga. Code Ann. § 27-2534.1(b)(7). At trial, the trial judge instructed the jury that before it was authorized to recommend the death penalty, it was necessary for the jury to find the existence of a statutory aggravating circumstance beyond a reasonable doubt. (T. 303, 304, 305, 306). The court instructed on the statutory definition of the (b)(7) aggravating circumstance (T. 304), and specifically instructed

that if an aggravating circumstance was not found, or if an aggravating circumstance was found and the jury chose to recommend a life sentence, then it would be incumbent upon the court to sentence the defendant to life imprisonment. (T. 305-306). It is clear from the record that the trial court did not specifically define the terminology within Ga. Code Ann. § 27-2534.1(b)(7).

In other cases, the Georgia Supreme Court has recognized that with the exception of the term "aggravated battery," the remainder of the terminology contained under (b)(7) require no explication. Gilreath v. State, 247 Ga. 814, 836, 279 S.E.2d 650 (1981); Stevens v. State, 245 Ga. 583, 586, 266 S.E.2d 194 (1980), cert. den., ___U.S.___, 101 S.Ct. 251 (1980); Burger v. State, 245 Ga. 458, 462, 265 S.E.2d 796 (1980), cert. den., 446 U.S. 988 (1980). This holding by the Georgia Supreme Court was correct. Recently, in Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980), cert. den., ___U.S.___, 101 S.Ct. 796 (1980), the Georgia Supreme Court engaged in a detailed analysis of the (b)(7) aggravating circumstance. In regards to the first portion of the statutory aggravating circumstance, the court stated:

> The phrases 'outrageously or wantonly vile, horrible or inhuman' are words of common understanding, have essentially the same meaning, and are included in the statute to distinguish ordinary murders for which the penalty of death is not appropriate, from those murders for which the death penalty may be imposed. Citing, Godfrey v. Georgia, 446 U.S. 420 (1980). Hance, supra at p. 861.

Godfrey v. Georgia, supra, specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon only a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." It was in this regard that the Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. This Court specifically reviewed the remainder of the (b)(7) aggravating circumstance which required either an aggravated battery to the victim, torture to the victim, or depravity of mind on the part of the defendant, and found all three lacking.

In the instant case, the jury made findings under both portions of the (b)(7) aggravating circumstance, and as opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrariness or any capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, demonstrated ample evidence to support the jury's finding that the victim suffered from torture and that the Petitioner had demontrated his depravity of mind beyond all doubt. In light of the aforesaid instructions to the jury, in light of the detailed review by the Georgia Supreme Court which insured said instructions were not applied arbitrarily or capriciously to the facts of this case, in light of the overwhelming evidence demonstrating aggravating circumstances under (b)(7), and in light of the simplicity of terms utilized therein, it is clear that Petitioner could not have been harmed by the absence of an explanation to the jury of the individual

meaning of the terms in Code § 27-2534.1(b)(7). This Court should also take notice that although the term "aggravated battery" was not explained to the jury, the jury did not make a finding on this portion of the (b)(7) aggravating circumstance.

Although Petitioner asserts that there is a strong likelihood that Petitioner's death penalty was based, at least in part, on an inappropriate consideration of post-mortem abuse of the victim, Petitioner's argument is based chiefly upon a portion of the district attorney's argument to the jury which is taken out of context. It appears that in making his remarks to the jury, the district attorney was referring to the entire circumstances surrounding the shooting.

In Petitioner's confession to the police he related in detail how he had smashed a whiskey bottle over the head of the victim. He further admitted,

> I reached in my belt with my right hand and pulled out my pistol and the guy was still lying on his back. I pointed the gun at the man and I pulled the trigger. I don't know how many times I shot him, but I could hear him moaning and trying to say something. . . (T. 151). (Emphasis added).

Gwinnett County Medical Examiner, Dr. Dove, performed the autopsy on the victim and testified that Dennis Beatenbo had received a crushing blow to his face which had broken his nose and had extensively damaged the tissue around both eyes. There

was also a bruise on the victim's forearm which was classified as a defensive type wound. (T. 102).

Furthermore, Dr. Dove testified that the victim suffered from three separate chest wounds from a gun which had been placed against his body and fired. At least two of these wounds could have inflicted pain and anguish upon the victim.

In summary, upon viewing all of the evidence, it is apparent that a reasonable, rational juror could have concluded that Dennis Beatenbo had been struck violently across the face and shot at least twice in the chest before a third shot killed him. A reasonable juror could also have concluded that this attack resulted in anogizing pain to the victim before he died.

Respondent submits that the aforesaid also demonstrates Petitioner's depravity of mind beyond all reasonable doubt. The aforecited acts surrounding the murder show a cold-blooded, brutal attack upon a helpless victim. The jury's finding of depravity of mind can best be supported simply by a review of those facts and by referring to a statement made by the Petitioner in answer to the question as to why he killed the victim. Petitioner answered simply, "Just to watch him die." (T. 168).

In conclusion, since the prosecutor's remarks did not deprive Petitioner of a fundamentally fair sentencing proceeding, and since the failure to define the individual terminology of (b)(7) did not harm Petitioner, in light of the overwhelming evidence supporting same and in light of the Georgia Supreme Court's review, this Court should decline to grant the writ to review Petitioner's fifth argument.

VI. THE TRIAL COURT MADE NO PREJUDICIAL, IMPROPER COMMENTS TO THE JURY.

Under Petitioner's sixth argument, he asserts that the trial court committed prejudicial error my making improper statements to the jury, allegedly insinuating surprise that the defendant had presented no evidence, and allegedly insinuating to the jury that they may not have heard all of the evidence. As the state habeas court concluded, these allegations are strained interpretations of the comments made by the trial court. For example, when Petitioner states that the court expressed surprise when the court asked, "The defendant has no evidence?"(T. 180), Petitioner is merely speculating. There is no indication from the cold record that the court in any way expressed anything beyond posing the mere question to determine what procedural steps the defendart wished to follow. Other statements made by the trial court, cited in Petitioner's brief, were merely explanations to the jury as to why they were asked to leave the courtroom. As the state habeas court noted, these statements would tend to minimize confusion and enlighten the jurors who may have well been wondering if, in fact, they had not heard all of the evidence while they were excused from the courtroom. (See Petitioner's Appendix D).

Since the state habeas court properly found that the trial judge's comments, as cited in Petitioner's brief, did not violate any of Petitioner's rights, this Court should refuse to grant certiorari to review Petitioner's sixth argument.

VII. EVEN IF THIS COURT SHOULD FIND THAT ONE OF THE AGGRAVATING CIRCUMSTANCES SUPPORTING PETITIONER'S DEATH PENALTY IS INVALID, HIS DEATH SENTENCE SHOULD NOT BE VACATED BECAUSE OF THE EXISTENCE OF AN ADDITIONAL AGGRAVATING CIRCUMSTANCE.

Under Petitioner's seventh argument, he asserts that should this Court declare one of his statutory aggravating circumstances supporting his death penalty to be invalid, then pursuant to Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), rehng. den. and modified, 648 F.2d 446 (5th Cir. 1981), cert. granted, 50 U.S. L.W. 3244 (1981),[1/] his death penalty should be vacated. Of course, arguments raised in Stephens are not relevant to this case, unless this Court finds that one of the statutory aggravating circumstances supporting Petitioner's death penalty is invalid. Assuming arguendo that situation arises, it appears that Stephens would be controlling; however, since there is no constitutional infirmity with either of the statutory aggravating circumstances supporting Petitioner's death penalty, Respondent submits that Stephens would have no bearing on this case. Thus, Petitioner's seventh argument presents no valid reason for granting the writ of certiorari in this case.

1/ On May 3, 1982, this Court issued an order certifying a question back to the Georgia Supreme Court pertaining to the issue raised on appeal; however, this Court retained jurisdiction. Zant v. Stephens, 31 Cr.L.R. 3035 (May 3, 1982).

VIII. IN LIGHT OF THE HEINOUS AND DEPRAVED NATURE OF THE MURDER IN THIS CASE, THE POTENTIAL MITIGATING FACTORS RAISED AT TRIAL BY PETITIONER DO NOT SUPPORT A FINDING THAT HIS DEATH PENALTY CONSTITUES CRUEL AND UNUSUAL PUNISHMENT.

Under Petitioner's eighth argument, he asserts that his death penalty constitues cruel and unusual punishment in light of an absence of a prior criminal record, in light of his age at the time of the crime, and in light of his alleged intoxication during the incident. In support of his contentions, Petitioner cites Eddings v. Oklahoma, ___U.S.___, 102 S.Ct. 869 (1982). Of course, in Eddings this Court did not reach the issue as to whether or not the Eighth Amendment forbid the execution of a youthful offender who was sixteen at the time of the offense. Id., at p. 874, fn. 5. In Eddings this Court vacated the death penalty and remanded so that the trial court could have an opportunity to consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances in light of the Eddings' opinion. Id., at p. 877.

Eddings is clearly distinguishable from the instant case, where the trial judge specifically instructed the jury that in arriving at their verdict, they were authorized to consider any mitigating evidence presented during the case. (T. 305). The trial court instructed the jury that even if it found statutory aggravating circumstances it still could provide for a life sentence for any reason it cared to do so. (T. 306).

There is no indication in this case, that the jury did not follow the trial court's instructions. As is noted in Petitioner's brief, Petitioner was nineteen years old at the time the crime was committed. Petitioner was old enough to purchase a pistol, viciously engage in a surprise attack upon victim Dennis Beatenbo, and maliciously murder him by firing point blank into Dennis Beatenbo's chest as he lie helpless and wounded on the ground. None of the factors listed by Petitioner can, in any way, mitigate his actions. Thus, this Court should decline to review the issues raised by his eighth argument.

IX. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY DURING THE SENTENCING PHASE OF PETITIONER'S TRIAL RELATING TO THE JURY'S CONSIDERATION OF MITIGATING AND AGGRAVATING CIRCUMSTANCES WERE SUFFICIENT.

Under Petitioner's ninth argument, he asserts that during the punishment phase of his trial, the trial court failed to give sufficient jury instructions on mitigating circumstances, and failed to charge that mitigating circumstances could outweigh the aggravating circumstances and thus require the sentencer to impose a verdict of life imprisonment rather than death.

As was previously noted, the trial judge did instruct the jury that before they were authorized to impose the death penalty, it was incumbent upon the state to demonstrate the existence of aggravating circumstances beyond a reasonable doubt.

Moreover, the trial court specifically charged the jury that even if it found the existence of aggravating circumstances, it could still impose a life sentence. The court went on to say:

> The sentence to be imposed in this case is a matter entirely within your discretion. And you may provide for a life sentence for this accused for any reason that is satisfactory to you, or you -- or without any reason, if you care to do so.
>
> The law vests the exclusive rights or right to the Jury to make or withhold a recommendation of a death sentence. (T. 306).

Although Petitioner appears to contend that the jury should have been instructed on the balancing of aggravating circumstances and mitigating circumstances, such a balancing is not required under the Georgia statute, and as the trial judge correctly stated, the jury may recommend a life sentence even though the aggravating circumstances far outweigh the mitigating circumstances or even though there are no mitigating circumstances. See Collier v. State, 244 Ga. 553, 569, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980); Jarrell v. Zant, 248 Ga. 492, 493, 284 S.E.2d 17 (1981).

Of course, this Court has expounded upon the requirement that the sentencer's discretion be guided in death penalty cases. In analyzing this requirement, the test to be applied, as enunciated in Godfrey v. Georgia, 446 U.S. 420 (1980) is:

'[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.' Citing Gregg v. Georgia, 428 U.S. 153, 159 (1976).

A capital sentencing scheme must, in short, provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many in which it is not.' Id., at 188, 96 S.Ct. at 2932 [cases omitted].

This means that . . . a state . . . must channel the sentencer's discretion by 'clear and objective standards' and 'specific and detailed guidance,' and that 'makes rationally reviewable the process for imposing a sentence of death.' [Citations and footnotes omitted]. Godfrey v. Georgia, 100 S.Ct. at p. 1764-1765.

When the trial court's instructions in this case are considered in their totality, including the references to the requirement that the jury must find beyond a reasonable doubt at least one of the statutory aggravating circumstances, the jury's discretion has been sufficiently directed and limited so as to minimize the risk of an arbitrary or capricious decision.

Although Petitioner asserts that the term mitigating circumstances should have been defined for the jury, Respondent submits that because of the simplicity of the term such a specific definition was not constitutionally required. The Georgia

Supreme Court has consistently held that mitigating circumstances need not be singled out for the jury. See Collier v. State, 244 Ga. 553, 261 S.E.2d 364 (1979), cert. den., 445 U.S. 946 (1980); Tucker v. State, 244 Ga. 721, 261 S.E.2d 635 (1979), cert. den., 445 U.S. 972 (1980); Cape v. State, 246 Ga. 520, 526, 272 S.E.2d 487 (1980), cert. den., 449 U.S. 1134 (1981).

It is not required that any certain litany of words be utilized in appraising the jury that it should consider mitigating circumstances. In Jurek v. Texas, 428 U.S. 262 (1976), the Texas jury never heard the phrase "mitigating circumstances" nor did it ever receive a definition of same.

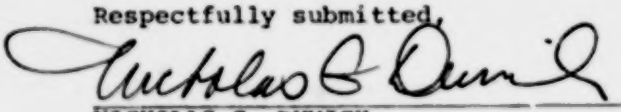
As the Georgia Supreme Court has correctly noted, the delineation of some factors by the trial court, which could have constituted mitigating circumstances, may have tended to overemphasize those factors, thus invading the jury's inherent prerogative to consider anything as mitigating. Collier v. State, 244 Ga. at p. 568-569. This danger is real as is evidenced by the recent decision in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), where the Court found reversible error during the sentencing phase of the defendant's trial, when the trial court had instructed the jury that in making its determination on sentencing, the jury could consider two specific mitigating circumstances. Although the trial court had referred to the word "only" when instructing the jury that it could consider certain specific aggravating circumstances, and the Court omitted the word "only" when instructing on mitigating circumstances; nevertheless, notwithstanding the clarity of the trial court's wording, the Court of Appeals found that a reasonable juror still may have interpreted the instructions as indicating that the jury

was limited to the two specific mitigating factors. This case underlines Respondent's argument and the Georgia Supreme Court's concern, that if specific mitigating factors are outlined, death penalty petitioners will be quick to argue that the court's enunciation of same may limit the jury's discretion in considering other matters in addition to the examples given. In conclusion, since the instructions, when taken as a whole, sufficiently guided the jury's discretion and informed them that they could consider mitigating factors in making their determination upon sentencing, and that they could impose a life sentence for any reason, even if they found aggravating circumstances, Respondent respectfully submits that this Court should decline Petitioner's request to review the argument set out in his ninth contention.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully requests this Court to deny Petitioner's request for a writ of certiorari.

Respectfully submitted,



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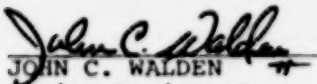

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